09-25-86	Sec. Labor for Richard Truex v. Consolidation Coal Company	WEVA 85-151-D
09-26-86	Local 1609, UMWA v. Greenwich Collieries	PENN 84-158-C
09-26-86	Local 2274, UMWA v. Clinchfield Coal Co.	VA 83-55-C
09-26-86	Local 1889, UMWA v. Westmoreland Coal Co.	WEVA 81-256-C

ADMINISTRATIVE LAW JUDGE DECISIONS

09-09-86	R & S Coal Company	CENT 86-49
09-09-86	Ted Dalton et al. v. Peabody Coal Co.	KENT 86-11-C
09-09-86	Emery Mining Corporation	WEST 83-6-R
09-09-86	Martha Perando v. Mettiki Coal Corp.	YORK 85-12-D
09-10-86	Sec. Labor for Ronnie Beavers, et al. v. Kitt Energy Corporation & UMWA	WEVA 85-73-D
09-11-86	Nelson Trucking	LAKE 85-102-M
09-11-86	Thomas Martinez v. Tower Resources, Inc.	WEST 86-3-D
09-15-86	Fife Rock Products Co., Inc.	WEST 85-141-M
09-15-86	Thunder Basin Coal Company	WEST 86-26
09-15-86	Thunder Basin Coal Company	WEST 86-34
09-15-86	Emery Mining Corporation	WEST 86-106-R
09-18-86	Brenda Faye Coal Sales Co., Inc.	KENT 85-112
09-19-86	John Hatter, Jr., v. Franklin Coal Co.	PENN 85-290-D
09-19-86	Yeaney, Shields, Brick, Partners	PENN 85-299
09-19-86	Greenwich Collieries	PENN 85-305
09-19-86	G & G Coal Company, Inc.	SE 86-36
09-19-86	Blue Circle Incorporated	SE 86-52-M
09-23-86	Mitch Coal Company, Inc.	KENT 86-98
09-23-86	Sec. Labor for Dennis Jones v. Southern Ohio Coal Company	WEVA 85-299-D
09-25-86	Donald E. Runyon v. Big Hill Coal Co.	KENT 86-58-D
09-25-86	Consolidation Coal Company	WEVA 86-249-R
09-25-86	Atlantic Cement Co., Inc.	YORK 86-1-M
09-26-86	Victor L. Taylor v. Phoenix Resources Inc.	WEVA 86-266-D
09-30-86	TAC & C Energy, Inc.	KENT 85-101
09-30-86	Rivco Dredging Corporation	KENT 86-111
09-30-86	Freeman United Coal Mining Co.	LAKE 86-27
09-30-86	Stanford Mining Company	PENN 85-288
09-30-86	Brubaker-Mann Incorporated	WEST 84-103-M
09-30-86	Brubaker-Mann Incorporated	WEST 85-177-M
09-30-86	Brubaker-Mann Incorporated	WEST 86-82-M
09-30-86	Brubaker-Mann Incorporated	WEST 86-94-M
09-30-86	Brubaker-Mann Incorporated	WEST 84-96-M
09-30-86	Raven Hocking Coal Corp.	WEVA 85-201
09-30-86	Consolidation Coal Company	WEVA 86-61-R

Secretary of Labor v. Peabody Coal Company, Docket No. LAKE 83-73.
(Judge Fauver, August 12, 1986 Settlement)

Secretary of Labor v. M. M. Sundt Construction Co., Docket No. CEN
(Judge Morris, July 11, 1986 Default)

Emery Mining Company v. Secretary of Labor, Docket Nos. WEST 82-12
WEST 86-131-R, WEST 86-140-R, WEST 86-141-R. (Judge Morris, Augus

The following case was denied review during the month of September

Secretary of Labor v. Brown Brothers Sand Co., Docket No. SE 86-12
(Judge Kennedy, August 21, 1986)

COMMISSION DECISIONS

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. LAKE 83-73
	:	
PEABODY COAL COMPANY	:	

BEFORE: Chairman Ford; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This matter comes before us as a result of Peabody Coal Company's response to the Secretary of Labor's Motion for Approval of Settlement The Response was submitted to the presiding Commission Administrative Law Judge William Fauver after he issued his Decision Approving Settlement. For the following reasons, we vacate the order approving settle and remand.

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Min Act"), the Secretary alleged two violations by Peabody of 30 C.F.R. § 75.200, the mandatory roof control standard for underground coal mines Following the filing of the Secretary's penalty proposal and Peabody's contest of the proposal, the matter was assigned to Judge Fauver. Subsequently, the Secretary moved for and received numerous continuanc on the grounds that there was pending against Peabody a criminal actio brought under section 110(d) of the Mine Act, 30 U.S.C. § 820(d), and based upon incidents involving the alleged violations in this civil penalty proceeding.

On June 12, 1986, the Secretary advised Judge Fauver that the criminal case had been resolved by Peabody entering a guilty plea to t violations of section 110(d). The Secretary stated that the parties h agreed to settle the subject civil penalty proceeding.

[the motion]." The motion recited the facts pertaining to Peabody's guilty plea in the criminal proceeding. The motion also asserted facts relating to the alleged violations in the civil penalty proceeding and to the statutory civil penalty criteria. Finally, the motion specified civil penalties deemed appropriate for the violations. Under the Commi sion's procedural rules Peabody's response, if any, to the Secretary's motion was due by August 23, 1986. 29 C.F.R § 2700.8 and 2700.10(b).

On August 12, 1986, the judge approved the settlement and dismisse the civil penalty proceeding. On August 20, 1986, counsel for Peabody submitted to the judge a response to the Secretary's motion. In the response counsel for Peabody took issue with portions of the Secretary' motion. Counsel asserted that the Secretary's motion referenced facts that had been stricken from the record of the criminal proceedings and counsel objected to language in the Secretary's motion bearing upon the gravity of the alleged violations and upon Peabody's negligence. Couns stated, however, that aside from these objections, Peabody agreed with and adopted the Secretary's motion for approval of settlement. Counsel requested that the judge "approve the settlement... and make this Respo and the objections herein a part of the record in this case."

Although Peabody's response was directed to Judge Fauver his juris diction in the case had terminated upon issuance of his decision approv the settlement. 29 C.F.R. § 2700.65(c). Under the Mine Act and the Commission's procedural rules, once a judge's decision has issued, relief from the decision may be sought by filing with the Commission a petition for discretionary review within 30 days of the decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). Although Peabody's response to the Secretary's motion is not in the form of a petition for discretionary review, we will treat the response as an implied request for relief and remand the matter to the judge.

"Settlement of contested issues is an integral part of dispute resolution under the Mine Act." Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). Section 110(k) of the Mine Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820 (k); see also 29 C.F.R. § 2700.30(a). Approval of a settlement by a Commission administrative law judge must be based upon "principled reasons," Knox County Stone Co. Inc., 3 FMSHRC 2478, 2480 (November 1981), including consider tion of the reasons for the proposed settlement and a weighing of the statutory penalty criteria. Davis Coal Co., 2 FMSHRC 619 (March 1980). Equally important, the record must reflect and the Commission must be assured that a motion for settlement, in fact, represents a genuine agreement between the parties, a true meeting of the minds as to its

ement as to the statutory penalty criteria of gravity and negligence. ite Peabody's stated acquiescence in the ultimate approval of the etary's settlement motion, it is clear that there is some disagreement een the parties regarding the precise terms upon which the settlement cceptable to each. Because Peabody was not a signatory to the eement" it now disputes in part, further proceedings are necessary. questions raised by Peabody's response must be considered in the t instance by the judge.

Accordingly, we accept Peabody's response for filing. The judge's sion approving settlement is vacated. We remand this matter to be ed for consideration of the impact of Peabody's response upon the lement process.

Ford B. Ford, Chairman

Richard V. Backley, Commissionr

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 86-6-M
M. M. SUNDT CONSTRUCTION COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under Federal Mine Safet and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Administrative Law Judge John J. Morris issued an Order of Dismissal c July 11, 1986, finding respondent M.M. Sundt Construction Company ("Su in default, dismissing Sundt's contest of the Secretary of Labor's proposal for a civil penalty, affirming the two citations in issue, an assessing a civil penalty of $40. 8 FMSHRC 1099 (July 1986)(ALJ). After the judge's decision was issued, Sundt submitted to the judge a "Motion for Reinstatement" requesting the reopening of the proceeding. Ultimately, this motion was forwarded to the Commission itself after t judge's order had become a final decision of the Commission by operati of the statute. For the reasons explained below, we deem Sundt's motion to constitute a request for relief from a final Commission deci vacate the judge's dismissal order, and remand for further proceedings

The main points of the procedural history of this matter may be stated briefly. On December 2, 1985, the Secretary filed with the Commission a Complaint Proposing Penalty, based on citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA at Sundt's Arizona crusher operation alleging violations of 30 C.F.R. §§ 56.5001 & 56.5050 (1985) (control of exposure to airborne contamina and control of exposure to noise, respectively). Sundt filed an answe contesting both alleged violations, and the case was assigned to Judge Morris of the Commission's Office of Administrative Law Judges in Denv Colorado.

the Prehearing Order and on June 26, 1986, the judge issued an Order to Show Cause directing Sundt to demonstrate "good cause," within 10 days for the failure to respond. Sundt again did not respond. On July 11, 1986, the judge issued the Order of Dismissal, based on Sundt's failure to respond to the Prehearing Order and the Order to Show Cause. (As noted, the judge found Sundt in default, dismissed its contest, affirmed the citations, and assessed a $40 civil penalty.)

On July 15, 1986, a letter dated July 8, 1986, was received at the judge's office. The letter was signed by Brian H. Murphy, Sundt's "Loss Control Manager." The letter apologized for Sundt's failure to respond to the prehearing order and asserted that Sundt's "records do not indicate our company ever receiving that correspondence." The letter belatedly requested an extension of time for compliance with the prehearing order. By letter dated July 15, 1986, the judge replied that he could not grant the requested extension of time because his jurisdiction had terminated upon the issuance of his dismissal order on July 11, 1986.

By "Motion of Reinstatement" dated August 7, 1986, and received in the judge's Denver Office on August 11, 1986, Sundt requested a reopening of the proceeding. The motion alleged that there had been "a lack of communication between MSHA and ourselves for which we would, again, like to apologize." By letter dated August 19, 1986, the judge again explained that his jurisdiction had terminated. He forwarded a copy of the Motion for Reinstatement to the Commission's Docket Office in Washington, D.C., where it was received on August 21, 1986.

The judge correctly indicated that his jurisdiction in this matter terminated when his dismissal order was issued on July 11, 1986. 29 C.F.R. § 2700.65(c). Any potential relief available to Sundt lay with the Commission in the form of a petition for discretionary review, which must be filed with the Commission, not the trial judge, within 30 days of a judge's decision. 29 C.F.R. §§ 2700.5(b) and 2700.70(a). Sundt's Motion for Reinstatement was submitted improperly to the judge and was not filed with the Commission until August 21, 1986, one day after the judge's decision had become final by operation of law. 30 U.S.C. 823(d)(1). Under the circumstances, Sundt's Motion for Reinstatement must be construed as a request for relief from a final Commission decision 29 C.F.R. 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. Pro. 60 (Relief From Judgment Order). See generally Harry L. Wadding v. Tunnelton Mining Co., 8 FMSHRC __, No. PENN 84-186-D, slip op. at 1 (August 20, 1986).

Two questions are presented: (1) Whether preliminary relief from final order should be permitted by

set forth in Fed. R. Civ. P. 60(b)(1), which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... mistake, inadvertence, surprise, or excusable neglect....

Sundt has proceeded without the benefit of counsel. Although Sundt's motion was not filed with the Commission's Docket Office until the 41s day after the judge's decision, it was submitted to the Commission's Denver Office within the required 30 days of the judge's decision. Therefore, we will treat the failure to file a timely petition as resulting from "mistake, inadvertence, ... or excusable neglect." Accordingly, we accept Sundt's submission as a late-filed petition for discretionary review. Cf. Gerald D. Boone v. Rebel Coal Co., 4 FMSHRC 1232, 1232-33 (July 1982).

As to the substantive aspects of Sundt's motion, the Commission h observed repeatedly that default is a harsh remedy. See, e.g., Easton Constr. Co., 3 FMSHRC 314, 315 (February 1981). In general, if a defaulting party can make a showing of adequate or good cause for the failure to respond to an order, the failure may be excused and appropriate proceedings on the merits permitted. See Valley Camp Coal Co., FMSHRC 791, 792 (July 1979) (default for failure to file a timely answ vacated upon showing of adequate cause for the failure). In assessing the existence of adequate cause, explanatory factors akin to those mentioned above in Fed. R. Civ. P. 60(b)(1) -- mistake, inadvertence, surprise, or excusable neglect -- may be relevant. Valley Camp, supra FMSHRC at 792 & n. 3. The absence of bad faith on the part of the defaulting party is also a relevant concern. Easton, supra. An attem to comply at least partially with the order in question may be a mitig factor as well. See, e.g., Sigler Mining Co., 3 FMSHRC 30 (January 1981). In one instance where an operator made a colorable showing of failure in the service upon it of the relevant show cause order, the Commission vacated a default order and remanded for resolution of whether proper service had occurred. Pocahontas Constr. Co., 3 FMSHRC 1184, 1184-85 (May 1981).

Sundt's July 8, 1986 letter to the judge and its Motion for Reinstatment, when read together, appear to allege that Sundt did not rece the prehearing order. We have examined the record and are unable to determine why Sundt did not receive the prehearing order. The existin record makes it difficult to evaluate at this point the merits of Sund motion, its reasons for delay, its good faith, and the equities involv

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

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September 22, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 83-82 WEVA 83-95
U.S. STEEL MINING CO., INC.	:	

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and presents the question of whether two violations of 30 C.F.R. § 70.101, the mandatory respirable dust standard when quartz is present, were of such nature as could significantly and substantially contribute to the cause and effect of a coal mine health hazard. 1/ Following a

1/ 30 C.F.R. § 70.101 provides:

Respirable dust standard when quartz is present. When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with § 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine

§ 70.101. 2/ For the reasons that follow, we conclude that the judge correctly found that the violations were significant and substantial we affirm his findings in this regard.

The violations at issue are based upon designated occupation sampling results obtained pursuant to 30 C.F.R. § 70.207 from mechani mining units ("MMU") in two different U.S. Steel mines. 3/ Citation 9917507, issued on September 1, 1982, alleged that the average concentration of respirable dust in the working environment of the designated occupation for MMU 024-0 at the Morton Mine was 1.9 milligrams per cubic meter of air. At the time, the unit was operat under a reduced respirable dust standard of 1.6 mg/m^3 based upon a previous quartz analysis showing that respirable dust in the mine atmosphere contained 6 percent quartz. The citation was terminated five respirable dust samples of the working environment of the designated occupation revealed an average respirable dust concentrati within 1.6 mg/m^3.

Citation No. 9914583, issued on October 20, 1982, alleged that average concentration of respirable dust in the working environment the designated occupation for MMU 002-0 at the Shawnee Mine was 1.7 mg/m^3. At the time, that unit was operating under a reduced respira dust standard of 1.4 mg/m^3 based upon a previous quartz analysis sho that respirable dust in the mine atmosphere contained 7 percent quart The citation was terminated when five respirable dust samples of the working environment of the designated occupation revealed an average respirable dust concentration within 1.4 mg/m^3.

2/ The Commisission declined to review the judge's decision insofar it related to Docket No. WEVA 82-390-R. Thus, although this docket number has been included in previous Commission orders relating to t case, our decision concerns only Docket Nos. WEVA 83-82 and WEVA 83-

3/ 30 C.F.R. § 70.207 requires an operator to take valid respirable dust samples from the designated occupation in each mechanized mining unit on a bimonthly basis. 30 C.F.R. § 70.2(h) in part defines a "mechanized mining unit" as "a unit of mining equipment including har loading equipment used for the production of material." On continuou miner units, such as those operated by U.S. Steel, the MMU normally consists of a continuous mining machine, two shuttle cars, and one o two roof bolting machines. Tr. 107. 30 C.F.R. § 70.2(f) defines "designated occupation" as "the occupation on a mechanized mining uni that has been determined by results of respirable dust samples to ha the greatest respirable dust concentration." Here, both citations a

the nature of the health hazard created by exposure to silica-bearing respirable dust. The medical testimony credited by the judge establis that silicosis is a pulmonary disease caused by silica-bearing (quartz dust retained by the lungs following respiration. 4/ The retained dus causes a scarring process, known as fibrosis. If the fibrosis occurs the most distal portions of the lungs, the alveoli, nodes of scar tiss develop which compromise the air exchange capacity of the lungs. Dama caused by the scarring is irreversible and there is no known treatment for the disease. Silicosis can develop into a life-threatening respira tory condition known as progressive massive fibrosis. (Such a conditio can develop also as the result of coal workers' pneumoconiosis.) Pro- gressive massive fibrosis can develop long after an individual's exposu to quartz-bearing dust has ceased.

A dose-response relationship exists between exposure to quartz-bea dust and the development of silicosis. The more silica dust an individ is exposed to, the greater the probability of developing silicosis. Based upon the data presently available, however, it is impossible to quantify the physiological effect of infrequent, low-level exposures to silica-bearing dust. However, it is known that there is, in any event, a cumulative dose-response effect from repeated exposures. An increased frequency of exposure and/or an increased concentration of dust increase the risk of developing silicosis.

The judge found that the Secretary had proved the violations of 30 C.F.R. § 70.101 alleged in the two citations and that the violations were significant and substantial. 6 FMSHRC at 1112-16. Concluding that the test for a significant and substantial violation enunciated by the Commission in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), was applicable to violations of health standards as well as to violations of safety standards, the judge applied the four-phase analysis of the National Gypsum test followed by the Commission in Mathies Coal Co., 6 FMSHRC 1 (January 1984). 5/ First, he found that

4/ Quartz is a form of silica described as "A crystallized silicon dioxide." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 884 (1968).

5/ In National Gypsum, the Commission stated:

[A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding

danger to a discrete health hazard because breathing excessive quanti of quartz-bearing respirable dust exposes miners to a risk of develop silicosis or pneumoconiosis. 6 FMSHRC at 1114. Third, he determined that there was a reasonable likelihood that the violations contribute to a hazard that would result in injury. Id. According to the judge preponderance of the evidence showed that each overexposure to quartz bearing respirable dust adds to the scarring process associated with silicosis so as to produce the lesions associated with progressive massive fibrosis. Finally, he found that there was a reasonable like hood that the injury in question would be of a reasonably serious nat 6 FMSHRC at 1114-15. The judge found that the very nature of silicos and pneumoconiosis defied specific proof of the exact injury that wil result from an exposure to respirable dust in excess of the applicabl standard. However, once overexposure occurs and the scarring process begins, each overexposure contributes to the cumulative effects until progressive massive fibrosis results. The judge stated that "Then, e if the miner stops working in a coal mine, the disease will continue cause increasing inability for the lungs to perform their function of purifying the blood and the miner will die prematurely...." 6 FMSHRC 1115. The judge concluded that the medical testimony at the hearing scientifically based and that it supported a finding that the violati were significant and substantial.

On review, U.S. Steel challenges only the judge's findings that violations were "significant and substantial." U.S. Steel maintains that the Secretary failed to establish that there was a reasonable likelihood that the hazard contributed to would result in an injury o illness because the Secretary did not ascribe a quantitative risk fac to the overexposures.

Although this case presents the first occasion for us to conside whether a violation of 30 C.F.R. § 70.101 is of such nature as could contribute significantly and substantially to the cause and effect of mine health hazard, we previously have considered the significant and

---

Footnote 5 end.

3 FMSHRC at 825.

In Mathies, the Commission stated:

> In order to establish that a violation of a mandatory safety sta is significant and substantial under National Gypsum, the Secret ... must prove: (1) the underlying violation of a mandatory safe

cluded that the National Gypsum significant and substantial analysis, "with certain adaptations appropriate in the context of [an] exposure-related health standard," is applicable in determining whether a violation of 30 C.F.R. § 70.100 is significant and substantial. 8 FMS at 891. The Commission there adapted the elements necessary to suppor a significant and substantial safety violation to cases involving viol tions of mandatory health standards and held that the Secretary must prove:

> (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

Consol, 8 FMSHRC at 897. Consol was decided after U.S. Steel's petiti for discretionary review had been granted. In light of the decision i Consol, the Commission afforded the parties leave to file supplemental briefs. The Secretary filed a brief; U.S. Steel declined. The Secret argues that the Commission's analysis for determining the significant and substantial nature of a violation of 30 C.F.R. § 70.100(a) is equa applicable for determining the significant and substantial nature of a violation of 30 C.F.R. § 70.101. We agree.

In Consol, the Commission noted that the statutory text of the Mi Act and its legislative history "reveal[] a clear congressional understanding of the unique nature of exposure-related health hazards of respirable dust and the control of those hazards." 8 FMSHRC at 895. Central to the Commission's decision was recognition that "prevention pneumoconiosis and other occupational illnesses is a fundamental purpo underlying the Mine Act." Id. (emphasis in original).

Section 70.101, the respirable dust standard involved in this cas is taken directly from section 205 of the Mine Act, 30 U.S.C. § 845, which, in turn, was carried over without significant change from the 1969 Coal Act, 30 U.S.C. § 801 et seq. (1976) (amended 1977). 6/ Thes

6/ Section 205 of the Mine Act provides:

Dust standards in presence of quartz

In coal mining operations where the concentration of respira

statutory sections set interim mandatory health standards, which the Secretary has adopted. Section 205 of the Mine Act is a more stringer cognate of section 202(b)(2), 30 U.S.C. § 842(b)(2), which requires operators to maintain the average concentration of respirable dust in the mine atmosphere in active workings at or below 2.0 mg/m^3. In sect 205, however, Congress determined that the increased hazard when more than 5 percent quartz is present in respirable dust requires a lower level of exposure.

Silicosis has been recognized for a long time as a disease associ with coal miners, and the inhalation of silica-bearing dust has been causally linked to the disease. See Coal Mine Health and Safety: Hear Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 91st Cong., 1st Sess., 764 (1969); Coal Mine Health and Safety: Hearings Before the Committee on Education and Labor, House of Representative, 91st Cong., 1st Sess., 119, 309, 310, 337 (1969). With cognizance of this hazard, section 102(a)(1) of the Senate bill which became the 1969 Coal Act required that the respirabl dust standard be reduced when coal dust contains more than 5 percent quartz and that the applicable dust standard "be determined in accorda with a formula prescribed by the Surgeon General." 7/ The Senate Comm report stated, "Since high quartz content in coal dust ... presents a greater health hazard, the Surgeon General is directed to prescribe th formula to be used in arriving at a dust standard for dust containing more than 5 percent quartz which offers comparable protection to the statutory standards for dust containing 5 percent or less quartz." S. Rep. No. 410, 91st Cong., 1st Sess. 46 (1969) reprinted in Senate Sub-committee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st. Sess., Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 172 (1975). It was in complying with this requirement of section 205 the 1969 Coal Act, that the Secretary of Health, Education, and Welfare prescribed, and the Secretary of the Interior adopted, the formula set forth in 30 C.F.R. § 70.101. The formula was developed by the National Institute for Occupational Safet and Health and was based upon Public Health Service studies evaluating the effects of free silica on respiratory health. See 36 Fed. Reg. 49 (March 16, 1971); U.S. Steel Mining Co. Inc., 5 FMSHRC 46, 50-51 (Janu 1983)(ALJ).

When Congress delegated to the Secretary of Health, Education, ar Welfare the authority to prescribe the applicable limit of respirable dust when the quartz content exceeds 5 percent, it intended that expos level to be the maximum level allowed to achieve its stated goal of

induced by silica-bearing dust, we next address the four elem
significant and substantial test as set forth in Consol.

The first element, the existence of the underlying viola
not an issue in this case. The judge found that the violatio
in the citations occurred, and U.S. Steel does not challenge
of violations. 6 FMSHRC at 1113-14.

The second element, a measure of danger to health posed
violation, is established also. Here, in mine atmosphere con
more than 5 percent quartz, miners were exposed to excessive
concentrations of respirable dust. These exposures were at 1
higher than those that Congress authorized be established to
the possibility of miners contracting silica-bearing dust ind
In Consol, we held that any exposure to respirable dust above
limit was deemed to present a discrete health hazard. 8 FMSH
The legislative and regulatory histories referred to above re
overexposure to respirable dust when quartz is present compel
conclusion. Therefore, we hold that any overexposure to resp
based upon designated occupation sampling results giving rise
violation of 30 C.F.R. § 70.101 presents a discrete health ha
proving the violations at issue in the instant proceeding, th
proved a discrete health hazard contributed to by the violati

The third element in the formula for determining the sig
and substantial nature of an exposure related health standard
the reasonable likelihood that the health hazard contributed
result in an illness. In Consol, the Commission recognized t
culty of predicting whether or when respiratory disease will
8 FMSHRC at 898. At the same time, the Commission also recog
Congress established the 2.0 mg/m^3 respirable dust standard a
available means of preventing disabling respiratory diseases.
light of these considerations, the Commission held:

> [G]iven the nature of the health hazard at issue, the potentially devasting consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, we hold that if the Secretary proves that an overexposure to respirable dust in violation of section 70.100(a), based upon designated occupation samples, has occurred, a presumption arises that the third element of the significant and substantia

These same considerations are involved in the instant proceeding t
prove a violation of section 70.101. Indeed, the nature of the health
hazard posed by excessive concentrations of respirable dust containing
quartz is in some respects greater than that posed by respirable dust
without quartz. The fibrosis associated with silica-bearing dust is
irreversible and may continue to develop after exposure has ended.
Although the present state of scientific and medical knowledge does not
make it possible to determine the precise point at which respirable
diseases induced by silica-bearing dust will develop, it is clear that
cumulative exposures to silica-bearing dust above the applicable exposu
limit are an important risk factor. Accordingly, given the nature of
the health hazards at issue, the potentially devastating consequences t
affected miners, and the strong concern expressed by Congress for the
elimination of occupation-related respiratory illnesses in miners, we
hold that where the Secretary proves an overexposure to respirable dust
in violation of section 70.101 based upon designated occupation samples
a presumption arises that the third element of the significant and
substantial test -- a reasonable likelihood that the hazard contributed
to will result in an illness -- is established.

The fourth element of the significant and substantial test, a
reasonable likelihood that the illness in question will be of a reason-
ably serious nature is not disputed. Congress found overexposure to
respirable dust containing quartz to be serious enough to require a
mandatory maximum permissible level of exposure. The judge found that
each exposure to excessive quantities of silica-bearing respirable dust
can contribute to the cumulative effects of dust-induced fibrosis and
lead to an increased inability of the lungs to perform their function o
aerating the blood and to premature death. 6 FMSHRC at 1115. The
evidence of record provides substantial support for the judge's finding

In Consol the Commission further held that, because analysis of th
four elements of the significant and substantial test would be essentia
the same in each instance in which the Secretary proves a violation of
30 C.F.R. § 70.100(a), proof of a violation gives rise to a presumption
that the violation is significant and substantial. 8 FMSHRC at 899. W
conclude that a similar presumption is appropriate when the Secretary
proves a violation of 30 C.F.R. § 70.101. We further hold that, as wit
a violation of section 70.100(a), the presumption can be rebutted by th
operator by establishing that miners in the designated occupation in
fact were not exposed to the excessive concentration of respirable dust
e.g., through the use of personal protective equipment. See 8 FMSHRC a
899. In the instant proceeding, there is no evidence that the miners

substantially to the cause and effect of a mine health hazard ar
by substantial evidence of record.

Therefore, the judge's decision is affirmed. 8/

Richard V. Backley, Commissio

Joyce A. Doyle, Commissioner

James A. Lastowka, Commission

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September 25, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 82-335
U.S. STEEL MINING COMPANY, INC.	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"), and involves one violation of 30 C.F.R. § 70.101, the mandatory respirable dust standard when quartz is present, 1/ and two violations of 30 C.F.R. § 75.503, a mandatory standard requiring that electric face equipment

1/ 30 C.F.R. § 70.101 provides:

> Respirable dust standard when quartz is present. When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuousl maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentratio determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.
>
> Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the

of the Mine Safety and Health Administration ("MSHA") found that those violations were "significant and substantial" within the meaning of section 104(d)(1) of the Mine Act. 3/

At a hearing on the merits before Commission Administrative Law Judge James A. Broderick, U.S. Steel Mining Company, Inc. ("U.S. Steel") admitted the violations, but contested the Secretary's assertion that two of the violations contributed significantly and substantially to the cause and effect of a mine safety or health hazard. Also, U.S. Steel contested the civil penalties proposed by the Secretary for each of the violations. Judge Broderick determined that the violations occurred and that the findings of the significant and substantial nature of the

2/ 30 C.F.R. § 75.503 provides:

Permissible electrical face equipment; maintenance. The operator of each coal mine shall maintain in permissible condition all electric face equipment required by §§ 75.500, 75.501, 75.504 to be permissible which is taken into or used inby the last open crosscut of any such mine.

3/ Section 104(d)(1) of the Mine Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such

stantial evidence supports the judge's penalty assessments. On t
bases discussed below, we affirm the judge's findings as to the s
cant and substantial nature of the violations and two of the judg
three penalty assessments. Because we find that the judge's negl
finding regarding the third violation is not supported by substan
evidence, we vacate the judge's penalty assessment for that viola
and assess a penalty commensurate with the statutory penalty crit

I.

We first consider the question of whether the violation of s
70.101 (Citation No. 9901317) is significant and substantial, wit
purview of the statute. The facts are not in dispute. U.S. Stee
and operates the Maple Creek No. 1 Mine, an underground coal mine
in Washington County, Pennsylvania. The citation alleges that th
average concentration of respirable dust in the working environme
the designated occupation on mechanized mining unit 010-0 was 1.8
grams per cubic meter of air (mg/m^3). 4/ At the time, the unit w
operating under a reduced respirable dust standard of 1.4 mg/m^3 b
upon a previous respirable dust analysis showing that the respira
dust in the mine atmosphere contained 7% quartz. The citation wa
terminated when five respirable dust samples of the working envir
of the continuous miner operator revealed an average respirable d
concentration of less than 1.4 mg/m^3.

In upholding the inspector's finding that the violation was
cant and substantial the judge, citing the Commission's decision
Cement Division, National Gypsum, 3 FMSHRC 822 (April 1981), conc
that the violation was reasonably likely to result in a reasonabl

4/ 30 C.F.R. § 70.207 requires an operator to take valid respir
dust samples from the designated occupation in each mechanized mi
unit on a bimonthly basis. 30 C.F.R. § 70.2(h), in pertinent par
defines a "mechanized mining unit" as "[a] unit of mining equipme
cluding hand loading equipment used for the production of materia
C.F.R. § 70.2(f) defines "designated occupation" as "the occupati
mechanized mining unit that has been determined by results of res
dust samples to have the greatest respirable dust concentration."
the case of the subject citation, the designated occupation was
the continuous mining machine operator.

5% can contribute to silicosis and to coal workers' pneumoconiosis. 5 FMSHRC at 1336. The judge stated:

> The quartz content in the dust can be a factor in the progression of simple coal workers pneumoconiosis. It can also cause silicosis, a progressive, serious disease of the lungs resulting from deposition of silica in the lung and the body's reaction to it.

Id. 6/ In summarizing his findings regarding the significant and substantial nature of the violation, the judge stated that although "[a]n exposure of 1.8 mg/m3 of respirable dust which contains approximately seven percent quartz ... would not in itself cause silicosis ... [it] would contribute in a substantial way to the risk of acquiring silicosis." 5 FMSHRC at 1336.

In a recent decision the Commission addressed for the first time the question of whether a violation of section 70.101 could significantly and substantially contribute to the cause and the effect of a coal mine health hazard. U.S. Steel Mining Co., Inc., Docket No. WEVA 83-82, etc., 8 FMSHRC ____ (September 22, 1986). There the Commission concluded that, in order to support an allegation that a violation of section 70.101 is significant and substantial, the Secretary must prove:

> (1) the underlying violation of ... [section 70.101]; (2) a discrete health hazard -- a measure of danger to health -- contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

U.S. Steel, slip op. at 6 (quoting from Consolidation Coal Co., 8 FMSHRC 890 (June 1986), appeal docketed, No. 86-1403 (D.C. Cir. July 11, 1986)).

5/ In National Gypsum, the Commission stated:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature.

upon such proof a rebuttable presumption arises that the violation co
significantly and substantially contribute to the cause and effect of
mine health hazard. U.S. Steel, slip op. at 8. We noted that this
presumption can be rebutted if the operator establishes that the miner
in the designated occupation were not, in fact, exposed to the excessi
concentrations of respirable dust, e.g., through the use of personal
protective equipment. Id.

In this proceeding the existence of the underlying violation is
not at issue because U.S. Steel concedes that it violated section 70.1
Further, U.S. Steel offered no evidence that the miners in the cited
designated occupation were not subject to exposure. We conclude that
the judge's findings regarding the significant and substantial nature
the violation at issue are supported by substantial evidence and are
consistent with the Commission's decisions in Consol and U.S. Steel,
supra. Accordingly, the judge's finding that the violation of 30 C.F.R
§ 70.101 is "significant and substantial" is affirmed.

II.

We next address the issues raised regarding the first violation of
30 C.F.R. § 75.503 (Citation No. 1249541). This violation concerns a
conduit on the packing gland of a shuttle car. 7/ During an inspection
of the mine an MSHA inspector observed a shuttle car on which a conduit
had pulled out of the packing gland. The shuttle car was transporting
coal cut by a continuous mining machine and was being "used inby the
last open crosscut." Section 75.503. The judge found that operation of
the shuttle car with the defective packing gland violated section 75.503
5 FMSHRC at 1337.

In considering the statutory penalty criteria, the judge found that
U.S. Steel was negligent, noting the inspector's testimony that it "had
been cited for the same condition 'quite a few times.'" 5 FMSHRC at
1337. U.S. Steel challenges this finding, arguing that the conduit
frequently pulls out of the packing glands during normal operations "no
matter what the operator does." U.S. Steel asserts that it performed
required weekly permissibility examinations (30 C.F.R. § 75.512-2) and
that its failure to discover the instant violation before the MSHA
inspector did was not the result of its negligence.

7/ A conduit is described as a "tube ... for receiving and protecting
electric wires." Dictionary of Mining and Related Terms 248. A packing
gland is described as an "explosion-

both the MSHA inspector and U.S. Steel's general maintenance for indicates that at the mine, conduits frequently pull out of pack glands, resulting in electric face equipment being in non-permis condition. Tr. 267-278; 285-286. Given U.S. Steel's awareness particular, recurring problem (which it suggests, but does not e is attributable to a design defect), the assertion that performa weekly permissibility exam precludes a negligence finding must b Weekly exams are the minimum inspection requirements imposed by C.F.R. § 75.512-2. In light of U.S. Steel's awareness of this s and recurring permissibility problem, more than the minimum leve attention to the packing glands was called for but, insofar as t record indicates, was not provided before electric face equipmen used in coal production. Given the nature of permissibility vio in general and the specific facts of record surrounding this cit the judge's negligence finding is affirmed. 8/

III.

The second violation of 30 C.F.R. § 75.503 (Citation No. 12 concerns a missing bolt on the control compartment of a shuttle During an inspection of the mine an MSHA inspector observed a sh car parked near the loading ramp. The car was energized but was then being used; other shuttle cars were being used to load coal examining the car, the inspector observed that a bolt was missin cover plate of the control compartment. (The control compartmen shuttle car contains electrical contactors. The cover plate of control compartment isolates electrical arcing from the mine atm The inspector cited U.S. Steel for a violation of 30 C.F.R. § 75 found that the violation was "significant and substantial" withi meaning of 30 U.S.C. § 814(d)(1). See nn. 2 & 3, supra.

In upholding the violation, the judge found that the violat properly designated significant and substantial and that U.S. St negligent. 5 FMSHRC at 1337. On review, U.S. Steel concedes th violation occurred but argues that the violation was not signifi substantial and that there is insufficient evidence of record to the judge's negligence finding.

We conclude that substantial evidence supports the judge's that the violation significantly and substantially contributed t cause and effect of a mine safety hazard. The inspector stated with the bolt missing if methane entered the control compartment could cause an ignition. An MSHA electrical inspector testified

U.S. Steel.

When the citation was issued, the shuttle car was energized. The Maple Creek No. 1 Mine liberates more than one million cubic feet of methane in a twenty-four hour period. The inspector stated, and the assistant mine foremen agreed, that there had been a methane ignition a the mine in the year preceding the hearing. We agree with the judge that under the particular facts and circumstances surrounding this violation the inspector properly determined that the violation was of a significant and substantial nature.

In assessing U.S. Steel's negligence for penalty purposes, the judge stated, without explication, that "the absence of the bolt should have been known to [U.S. Steel]" and that "the violation was the result of [U.S. Steel's] negligence." 5 FMSHRC at 1337. U.S. Steel argues that the record does not establish that it acted negligently in connection with this violation. We agree. The burden of establishing an operator's negligence under section 110(i), 30 U.S.C. § 820(i), rests c the Secretary. Unlike the permissibility violation discussed hereinabove, nothing in the record pertaining to this violation suggests that at the time of the issuance of the citation U.S. Steel knew or should have known that the bolt was missing. The shuttle car involved was not being operated and had not been used in production during the shift tha was then ongoing. Tr. 330. In response to questions, the MSHA inspecto indicated that he was unable to determine whether the operator was awar of the missing bolt (Tr. 296) and that various possible explanations fo the missing bolt could include a "set up" of the violation (Tr. 305), a "jarring out" during previous use of the shuttle (Tr. 308), or a miner' removal of the cover plate and an inadvertent failure to replace this bolt. Id. In sum, the inspector revealed that he had no real basis fo forming a firm belief as to why the bolt was missing or why U.S. Steel should be found negligent. We conclude that although the fact that the bolt was missing is sufficient to establish the violation, it does not constitute substantial evidence of U.S. Steel's negligence in connectio with the violation. Accordingly, the judge's finding of negligence is vacated and the penalty assessment is reduced from $200 to $100.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

9/ Chairman Ford did not participate in the consideration or disposit
of this matter.

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Administrative Law Judge James A. Broderick
Federal Mine Safety & Health Review Commission
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ADMINISTRATION (MSHA), on behalf of RICHARD TRUEX	:	
v.	:	Docket No. WEVA 85-151-D
CONSOLIDATION COAL COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This case involves a discrimination complaint brought by the S of Labor on behalf of Richard Truex, pursuant to the Federal Mine S and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Ac "Act"). The complaint alleges that Consolidation Coal Company ("Co discriminated against Mr. Truex in violation of section 105(c)(1) o Mine Act. 1/ The Secretary asserts that Consol violated section 10

1/ Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this [Act], including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employme is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this [Act] or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or

violation. 7 FMSHRC 1401, 1404 (September 1985)(ALJ). The Commission granted Consol's petition for discretionary review. For the reasons that follow, we affirm the judge's decision.

The facts are not in dispute. Truex is a longwall mechanic at Consol's McElroy Mine located in Marshall County, West Virginia; he is member of the United Mine Workers of America ("UMWA" or "Union"). At the time of the events herein he was a member of the Union safety committee at the mine. On August 27, 1984, Department of Labor, Mine Safety and Health Administration ("MSHA") Inspector, James Mackey, telephoned Consol's mine safety director, Tom Olzer, and informed Olzer that he would be at the mine at approximately 9:30 a.m. the next morni

2/ Section 103(f) of the Act provides:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a) of this section, for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this [Act].

30 U.S.C. § 813(f).

The next day, August 28, 1984, Truex was scheduled to work the 8:00 a.m. to 4:00 p.m. shift. At 7:50 a.m., Truex informed Olzer that he was the representative of miners for the meeting with Inspector Mackey who had not yet arrived at the mine. Olzer told Truex he would have to go to work underground with his regular crew. Truex indicated his willingness to work with his regular crew but asked that he be notified when the MSHA inspector arrived so that he could attend the meeting. Olzer replied that a representative of miners would be notified and given an opportunity to attend the meeting with the inspector. It is undisputed that had Truex proceeded underground to work with his crew, it is unlike that he would have been notified of the inspector's arrival or been available to attend the meeting. Truex then requested that he be given alternate work in an area that would allow him to be readily available for the meeting. Olzer denied this request and instructed Truex to go underground to work with his regular crew.

At this point, Truex declared himself to be on "union business" because he believed that otherwise he would not be able to attend the conference as the designated representative of miners. 3/ Truex waited at the mine for the inspector who arrived sometime between 9 a.m. and 9:45 a.m. Stipulation 20. Truex attended the one and one-half hour meeting on the hearing conservation plan with the inspector and Olzer. At the close of the meeting, Truex asked Olzer if any work was available for him. Olzer told Truex that, because he had declared himself to be on "union business," no work was available for him for the remainder of the shift. Truex then left the mine property.

On October 5, 1984, Consol received a citation from an MSHA inspector alleging a violation of section 103(f) for refusing to pay Truex for the time during which he participated in the meeting concerning the hearing conservation plan. Consol abated this citation by paying Truex for the one and one-half hour period spent at the meeting.

Consol refused to pay Truex for the remaining six and one-half hours he was scheduled to work on August 28, 1984. Truex filed a complaint with MSHA alleging discrimination under section 105(c)(1) of the Mine Act. Following an investigation by MSHA, the Secretary filed with the Commission a discrimination complaint on behalf of Truex that is the subject of the present proceeding. The parties then filed briefs, submitted stipulated facts, and the judge subsequently issued his decis 7 FMSHRC 1401.

3/ "Union business" is an excused unpaid leave of absence to particip in union activities provided for in Article XVII of the National Bitumi Coal Wage Agreement of 1981 ("Contract"). See Stipulations of Fact,

post-inspection conference which ... Truex attended was a conference within the meaning of section 103(f) of the Act ...", the judge concluded that in light of the language of the statute, miners, not mine operators were given the right to authorize or designate miner representatives for the purpose of participating in the section 103(f) conferences. 7 FMSHRC at 1403-04. Accordingly, the judge held that Consol's action "in denying [Truex] the statutory right to act as the 'authorized' representative of miners under section 103(f) without in effect compelling him to first declare himself to be on union business" was discriminatory 7 FMSHRC at 1404. Further, the judge concluded that the effect of Consol's discriminatory action was to require Truex to lose six and one-half hours' pay for serving as the authorized representative of miners. 7 FMSHRC at 1404.

On review, Consol contends that the judge erred in finding that it violated section 103(f) and discriminated against Truex in violation of section 105(c)(1) of the Act. Consol raises a number of arguments in support of this contention. Consol argues that under the circumstances presented the Union could not insist on designating Truex as the miner representative and that Consol could comply with section 103(f) by offering to permit one of the other 130 hourly employees to participate in the conference as a representative of miners. Consol emphasizes that at the time Truex notified management that he was the representative, the MSHA inspector had not arrived and was not expected for about one and one-half hours. 4/ Consol asserts that its duty under section 103(f) does not arise until such time as the MSHA inspection activity begins and that Truex's request constituted an impermissible infringement on management's work assignment prerogatives. Consol also asserts that the Union failed to comply with the requirements of 30 C.F.R. Part 40 with respect to filing information identifying the representative of miners and that this failure entitled Consol to follow past practice and provide any one of the miners the opportunity to participate as the miner representative. Finally, Consol contends that once Truex elected to go on "union business" he was no longer under the direction and control of Consol, and therefore Consol had no obligation to assign work to him or to pay him for the remainder of the shift.

4/ Consol asserts that MSHA Inspector Mackey violated the provisions of section 110(e), 30 U.S.C. § 820(e), prohibiting advance notice of inspections, when he telephoned Olzer and informed Olzer that he would be at the mine the next morning to review the hearing conservation plan. Although Consol contends the judge erred in failing to consider this

(footnote continued)

sentative. The Secretary notes that Olzer was informed that Truex was the representative of miners for the conference at issue. Therefore, the Secretary contends that Consol's assertion that any of the 130 miners could have served as the authorized representative of miners is erroneous. According to the Secretary, once Consol was notified that Truex was the miners' designated representative, Consol was required b the statute to afford him an opportunity to participate in the meeting without a loss in pay.

For the reasons that follow, we conclude that the judge correctly found that, in the circumstances of this case, Consol discriminated against Truex in violation of section 105(c)(1) of the Act.

Under the Mine Act, a complaining miner establishes a prima facie case of discrimination by proving he engaged in protected activity and that the adverse action complained of was motivated in any part by tha activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub. nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie cas by showing either that no protected activity occurred or that the adve action was not motivated in any part by protected activity. Robinette 3 FMSHRC at 818 n. 20. Thus, Truex must first show that his attempt t attend the conference with Inspector Mackey was protected under the Ac Therefore, we first consider the rights conferred upon miners by secti 103(f). We emphasize at the outset, however, that the parties have stipulated that the meeting with Inspector Mackey was "the type of activity giving rise to [miner] participation rights under section 103(f) of the Act." Stipulation 31. We are constrained in this case the parties' stipulations and our decision is restricted solely to the facts presented.

Footnote 4 end.

argument, the issue was not raised before the judge. Consol advances for the first time on review. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. § 823(d)(2)(A)(iii Jones & Laughlin Steel Corp., 5 FMSHRC 1209, 1212 (July 1983). Such good cause has not been demonstrated. Consequently, the "advance noti issue is not before us and will not be addressed.

sentative of miners is compensable. Congress recognized the important function served by such rights. The Senate Report stated, "It is the Committee's view that [participation in inspections and pre- and post-inspection conferences] will enable miners to understand the safety and health requirements of the Act and will enhance mine safety and health awareness." S. Rep. No. 181, 95th Cong., 1st Sess. 28-29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 616-17 (1978) ("Legis. Hist."). See also Magma Copper Co., 1 FMSHRC 1948, 1951-52 (December 1979), aff'd, Magma Copper Co. v. FMSHRC, 645 F.2d 694 (9th Cir. 1981), cert. denied, 454 U.S. 940 (1981).

The judge found that "it is the miners and not the mine operator, who authorize or designate a representative for the purpose of participating in ... a [post-inspection] conference. There is no statutory ambiguity on this point and the plain meaning must prevail." 7 FMSHRC at 1404. We agree. The language of section 103(f), providing that "a representative authorized by his miners shall be given an opportunity to accompany the Secretary", unambiguously provides that miners possess the right to choose their representative for section 103(f) inspections and pre- and post-inspection conferences. (Emphasis added). See also Leslie Coal Mining Co. v. Secretary of Labor, 1 FMSHRC 2022, 2027 (December 1979)(ALJ).

The undisputed record evidence establishes that Truex was selected by the miners to serve as their representative for the meeting at issue. The president of the Union local, Lipinski, assigned Truex to serve as the miners' representative at the meeting with Inspector Mackey. On the morning of the meeting, Truex informed Olzer that he had been designated as the miners' representative for the meeting with the inspector. Consol does not dispute that, for the purpose of the meeting, Truex was designated by the miners as their authorized representative. See Stipulation 34. The parties agree that had Truex proceeded to work with his regular crew, it is likely that he would not have been notified of the inspector's arrival nor have been available to attend the conference Stipulation 17. Further, Consol does not dispute that Truex understood this to be the case and went on "union business" only to be able to act as the representative of miners at the meeting. Stipulation 33. Consequently, it is clear that Consol's refusal to either agree to notify Truex at his underground work station of the inspector's arrival and allow him to leave to attend the meeting or to reassign him work in an area from which he could have easily attended the meeting effectively denied miners their choice of representative at the conference. Furthermore, as explained below, the miners' choice of Truex as their

this record. The purpose of section 103(f) is to enhance miner understanding and awareness of the health and safety requirements of the Act The fact that section 103(f) protects the miner representative, who is also an employee of the operator, from a loss in pay in exercising his section 103(f) rights evidences Congressional recognition that an opera would be required to make modifications in work assignments to permit miner representatives to exercise section 103(f) rights. Here, Consol was aware that an MSHA inspector would be arriving for a meeting to review a hearing conservation plan. Consol was also aware that Truex was familiar with the plan and had been designated by the miners to participate as their representative in the review of the plan. Nevertheless, upon being notified that Truex was the representative of miner Olzer directed Truex to proceed underground with his regular crew. Truex indicated his willingness to do so, but asked that he be notified when the inspector arrived. This request was refused. Olzer further refused Truex's request that he be permitted to work, until the inspect arrived, in an area that would have allowed him to be readily available for the meeting. Under these circumstances, Truex's requests rather than Olzer's responses reflected the reasonable work adjustments requir under section 103(f) to fully effectuate that section's participation rights.

Olzer's violative refusal caused Truex, if he was to fulfill his statutory role as a representative of the miners, to declare himself or "union business". Accordingly, at the time that Truex invoked the Wage Contract right, Consol already had acted in violation of section 105(c) interfering with Truex's section 103(f) rights. Thus, Consol's attempt to use the Contract as a defense is irrelevant and Consol is liable for payment of the six and one-half hours of wages Truex would have earned absent its violation.

Finally, we are not persuaded that the Union's failure to file information required by 30 C.F.R. sections 40.2(a) and 40.3 regarding the identification of representatives of miners defeats Truex's claim here. In Consolidation Coal Co. v. Secretary of Labor and United Mine Workers of America, 3 FMSHRC 617 (March 1981), the Commission held that the failure to file as a representative of miners under Part 40 did not per se entitle an operator to deny an individual walkaround participati rights. 3 FMSHRC at 619. The Commission recognized that "In a particular situation, absent filing, an operator may in good faith lack a reasonable basis for believing that a person is in fact an authorized representative of miners." Id. Here, however, as the judge noted and as the stipulations establish, Consol did not question that Truex was, in fact, the designated representative of miners for the conference at

Ford B. Ford, Chairman

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James A. Lastowka, Commissioner

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September 26, 1986

LOCAL UNION 1609, DISTRICT 2, UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. PENN 84-158-C
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), mirrors the issues raised in Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., Docket No. WEVA 81-256-C, decided this same date. At issue is whether miners idled following an underground explosion are entitled to one-week compensation under the provisions of the third sentence of section 111 of the Mine Act. 1/ Commission Administrative Law Judge George A. Koutra

1/ The first three sentences of section 111 of the Mine Act state:

> [1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ... section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compen-
sated after all interested parties

section 103 order of withdrawal, not due to a subsequently issued sect 107(a) imminent danger order of withdrawal; and (2) that the section 107(a) order failed to allege a violation of a mandatory standard. 6 FMSHRC 2465 (October 1984)(ALJ). For the reasons set forth in our decision in Westmoreland, supra, we reverse and remand.

The facts are not in dispute. An explosion occurred at about 5:00 a.m., February 16, 1984, in the No. 1 underground coal mine of Greenwich Collieries ("Greenwich") located in Indiana County, Pennsylvania. At 7:00 a.m. that same morning an inspector of the Department Labor's Mine Safety and Health Administration ("MSHA"), Gary Raisbough issued a section 103(j) withdrawal order, which covered the entire mine. 2/ The section 103(j) order stated:

> A methane ignition and/or explosion has occurred at approximately 5:00 a.m. in and around the active D-5 (037) working section. Three miners who were working in the D-3 section are not accounted for. The following persons are permitted to enter or remain in the mine for the purpose of rescue operations: State and MSHA officials, company officials and UMWA personnel who are necessary to conduct the rescue operations.

2/ Section 103(j) of the Mine Act states:

Accident notifications rescue and recovery activities

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evide which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, w rescue and recovery work is necessary, the Secretary or an author representative of the Secretary shall take whatever action he dee appropriate to protect the life of any person, and he may, if he it appropriate, supervise and direct the rescue and recovery acti in such mine.

30 U.S.C. § 813(j)(emphasis added). Orders issued pursuant to section 103(j) or section 103(k) of the Mine Act, 30 U.S.C. § 813(k), are comm known as "control orders" since they are the means by which the Secret may assume initial control of a mine in the event of an accident in

of any persons in the mine until an examination is made to determine if the entire mine is safe.

At 2:00 p.m. that afternoon the section 103(j) control order was modifi to a section 103(k) control order. 4/

As a result of the mine explosion, three miners were killed and several others were injured. The section 107(a) order was not terminated until April 30, 1984. On February 25, 1984, while the mine was

3/ Section 107(a) of the Mine Act provides:

Procedures to counteract dangerous conditions

(a) Withdrawal order

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104](c) of this [Act], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation unde section [104] of this [Act] or the proposing of a penalty under section [110] of this [Act.]

30 U.S.C. § 817(a).

4/ Section 103(k) of the Mine Act states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of an plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

the mine a "saturation" inspection, which resulted in the issuance of orders of withdrawal to Greenwich pursuant to section 104(d)(1) of e Mine Act. 30 U.S.C. § 814(d)(1). In May 1984, the UMWA filed two mplaints with the Commission seeking one-week compensation for the ners' idlement: in Docket No. PENN 84-158-C, the case now pending on view, the UMWA based its claim on the section 107(a) imminent danger der; in Docket No. PENN 84-159-C, the claim was premised on the later ction 104(d) orders of withdrawal. The complaints were assigned to d consolidated for hearing by Judge Koutras.

On October 18, 1984, Judge Koutras issued a summary decision dis-ssing both of the UMWA's compensation complaints. With respect to cket No. PENN 84-159-C, he concluded that the UMWA could not show, as necessary prerequisite to one-week compensation under section 111, at the miners had been idled "due to" the section 104(d) orders because e miners were idled already by the previous section 103 and section 7 orders. 6 FMSHRC at 2476-77. Concerning Docket No. PENN 84-158-C, e judge stated, "[T]he condition precedent for the awarding of a ek's compensation in these circumstances is that the mine is idled by e issuance of a § 107(a) order which cites a violation." 6 FMSHRC at 77. He found that the mine was closed by and the miners idled due to e section 103 order, not the subsequently issued section 107(a) imminer nger order, and noted that the latter order did not cite a violation a standard on its face. 6 FMSHRC at 2477-78. The judge also denied e UMWA's request that he retain jurisdiction of the complaint pending e outcome of MSHA's investigation into the causes of the mine explosion FMSHRC at 2478. Based on these findings, the judge dismissed the com-aint.

Subsequently, the UMWA petitioned for review only as to Docket No. NN 84-158-C. The Commission directed review and heard consolidated al argument in this matter and two other compensation cases decided is date, Westmoreland, supra, and Loc. U. 2274, Dist. 28, UMWA v. inchfield Coal Co., Docket No. VA 83-55-C.

While this matter was pending on review, MSHA's investigation into e causes of the explosion continued. In view of our disposition of is proceeding, it is necessary to note briefly certain procedural velopments relevant to MSHA's investigation. Between March 27 and ril 27, 1984, MSHA had obtained from 66 persons sworn statements ncerning the possible causes of the explosion. On March 29, 1985, HA issued Greenwich five section 104(d)(1) withdrawal orders citing olations of 30 C.F.R. §§ 75.301, 75.303(a), 75.316 and 75.322, mandato fety standards dealing with ventilation and preshift examination uirements. Each order noted: "This [cited] condition was observed

to the judge to allow him to rule as to whether the allegations
violation contained in the section 104(d)(1) orders established
required nexus between the section 107(a) imminent danger order
underlying violations of mandatory standards. By order dated Ju
1985, the Commission denied the motion for remand, observing tha
judge had already "rejected the contention that subsequently iss
orders may serve as a basis for an award of compensation under t
circumstances presented in this case."

On September 6, 1985, the Secretary issued his final Report
Investigation regarding the explosion. In essence, the report c
that the explosion was caused by a dangerous accumulation of met
ignited by electrical arcing. The report also listed as "condit
practices ... contribut[ing] to the explosion" the five violatio
in the section 104(d)(1) orders issued in March 1985. MSHA, U.S
of Labor, Report of Investigation, Underground Coal Mine Explosi
Collieries No. 1 Mine, etc. 68-69 (1985). The Commission permit
UMWA to submit a supplemental brief in the present compensation
discussing the report's impact, if any, on the issues presented.

Meanwhile, Greenwich's separate contest of the five section
withdrawal orders had been assigned for hearing by Commission Ad
Law Judge Roy J. Maurer. On July 14, 1986, Judge Maurer issued
granting Greenwich partial summary judgment. 8 FMSHRC 1105 (Jul
The judge vacated the section 104(d)(1) orders "because they wer
issued based on a finding by an MSHA inspector of an existing vi
observed or detected during an inspection, but rather are based
investigation of pre-existing, terminated violations...." 8 FMS
1107. The judge modified the orders to section 104(a) citations
U.S.C. § 814(a), holding that "under the totality of the circums
they had been issued "'with reasonable promptness'" as required
that provision. 8 FMSHRC at 1107. The judge indicated that fur
proceedings on these modified citations would commence. On Augu
1986, however, we granted petitions for interlocutory review fil
the Secretary and the UMWA and stayed further proceedings before
Maurer. The issues presented on interlocutory review concern on
judge's determination that the orders were not properly issued u
section 104(d)(1).

In Westmoreland, issued this same date, we have addressed t
the proper interpretation of section 111. The material issues p
here are identical to the issues addressed and resolved in Westm
and, accordingly, the rationale of the latter decision is contro

For the reasons stated in Westmoreland, slip op. at 7-11, t

one-week compensation claim. We reverse the judge's findings to the contrary.

For the reasons stated in Westmoreland, slip op. at 11-12, we also reverse the judge's determination that in order to trigger entitlement to one-week compensation a section 107(a) order must itself allege a violation of a mandatory standard. As we concluded in Westmoreland, although an imminent danger order may allege or be modified later to allege a violation, allegations of violation subsequently cited by MSHA in section 104 citations or orders, once admitted or found, also may supply the necessary nexus between the imminent danger order and an underlying violation of a mandatory standard. Westmoreland, slip op. a 13-14.

As discussed above, MSHA issued and Greenwich has contested five section 104(d)(1) orders alleging violations that, allegedly, contribut to the methane ignition and explosion. Docket Nos. PENN 85-188-R, etc. As noted, the presiding judge in that separate matter vacated those orders on procedural grounds and modified them to section 104(a) citati The validity of the orders -- but not any allegation of violation conta in them -- is now pending before us in a separate proceeding on interlo tory review. In the present case, the UMWA contends that these alleged violations supply the required nexus with the imminent danger order for purposes of one-week compensation under the third sentence of section 111.

We held in Westmoreland that the precise form in which MSHA allege a violation is not controlling for compensation purposes. Westmoreland slip op. at 11-14. Therefore, the resolution of the procedural issue presented to the Commission on interlocutory review in Docket Nos. PENN 85-188-R, etc., will not directly affect the UMWA's claim in this compe sation proceeding that the violations provide the required nexus. The UMWA's assertion of nexus, however, could be affected by the ultimate resolution of the merits of the violations themselves in Docket Nos. PENN 85-188-R, etc.

Thus, this compensation proceeding is remanded to Judge Koutras with instructions to hold the UMWA's complaint in abeyance pending fina administrative resolution of the merits of the alleged violations in Docket Nos. PENN 85-188-R, etc. Cf. Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 5 FMSHRC 1406, 1410-13 (August 1983). Upon fina disposition with respect to the merits of the alleged violations, Judge Koutras shall then afford the parties the opportunity to litigate the question of the nexus, if any, between any violations and the issuance of the section 107(a) imminent danger order.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commission

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

5/ Chairman Ford did not participate in the consideration or disp of this matter.

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September 26, 1986

LOCAL UNION 2274, DISTRICT 28, UNITED MINE WORKERS OF AMERICA	:	
v.	:	Docket No. VA 83-55-C
CLINCHFIELD COAL COMPANY	:	

BEFORE: Backley, Doyle, Lastowka, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

In this compensation proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), the issue presented is whether miners idled following an underground mine explosion are entitled to one-week compensation pursuant to the third sentence of section 111 of the Mine Act. 1/ Former Commission Administrative Law

1/ The first three sentences of section 111 provide:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ... section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public [illegible] which shall be expedited [illegible]

Coal Co., Docket No. WEVA 81-256-C, we reverse and remand.

The compensation claim at issue arose following an underground explosion that occurred at Clinchfield's McClure No. 1 underground coal mine in Dickenson County, Virginia, on June 21, 1983. On the morning of June 22, 1983, at 3:42 a.m., an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Al Castenedo, issued a withdrawal order, pursuant to section 103(k) of the Mine Act, that affected the entire mine. 2/ The withdrawal order stated:

> A fatal mine explosion has occurred in the 2 Left active section. This order is issued to assure the safety of any person in the coal mine until an examination or investigation is made to determine that the mine is safe to work. Only those persons selected from the company, state and miners representatives, officials and other persons who are deemed by MSHA to have information relevant to the investigation may enter or remain in the affected area.

At 4:00 a.m. the same morning, the inspector issued a second withdrawa order. This order, issued pursuant to section 107(a) of the Act, cite the existence of an imminent danger. It also covered the entire mine. The withdrawal order stated:

2/ Section 103(k) states:

> Safety orders; recovery plans
>
> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present may issue such orders as he deems appropriate to insure the safet of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consult with appropriate State representatives, when feasible, of any pla to recover any person in such mine or to recover the coal or othe mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k). Orders issued pursuant to section 103(k) or secti 103(j), 30 U.S.C. § 813(j), are commonly referred to as "control order since they are the means by which the Secretary may assume initial control of a mine in the event of an accident, in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

The section 107(a) imminent danger order was terminated on July 1983, and on September 30, 1983, the UMWA filed its claim for one-we compensation based on the imminent danger withdrawal order and on al violations of mandatory standards found by MSHA inspectors during th subsequent investigation of the explosion.

In an unreported order issued on December 16, 1983, the admini- strative law judge denied Clinchfield's motion to dismiss the UMWA's compensation claim. The judge rejected Clinchfield's argument that miners already had been idled by the initial section 103 "control" o and, therefore, could not have been idled by the section 107(a) immi danger order as required under the third sentence of section 111. Noting that compensation under the third sentence of section 111 cou be initiated only by an order issued pursuant to sections 104 or 10 the Mine Act, the judge concluded that the section 103 order was irrelevant to the UMWA's claim under the third sentence of section He reasoned that the subsequent section 107(a) order was like "a sec padlock on the door," which prevented the miners from entering the just as the first order had withdrawn them initially. However, the judge concluded that, for purposes of the one-week compensation cla the idlement must result from "an order which charges a violation o health or safety standards." (Emphasis added.) The judge retained

3/ Section 107(a) provides:

> Procedures to counteract dangerous conditions
>
> (a) Withdrawal orders
>
> If, upon any inspection or investigation of a coal or oth mine which is subject to this Act, an authorized representativ the Secretary finds that an imminent danger exists, such repre sentative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiri the operator of such mine to cause all persons, except those referred to in section [104](c) of this [Act], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that suc imminent danger and the conditions or practices which caused s imminent danger no longer exists. The issuance of an order un this subsection shall not preclude the issuance of a citation section [104] of this [Act] or the proposing of a penalty unde section [110] of this [Act.]

30 U.S.C. § 817(a).

accident investigation report, and expressing surprise that MSHA apparently had given no thought to modifying the section 107(a) orde allege violations of mandatory standards, the judge concluded:

> The mine was closed because an inspector thought an imminent danger existed not because he thought there was "a failure of the operator to comply with any mandatory health or safety standards." The fact that the explosion that led to the order was actually, in accordance with my assumptions, caused by the violations does not affect the fact that the inspector did not issue the order "for a failure of the operator to comply with ... safety standards."

6 FMSHRC at 1784.

We granted the UMWA's petition for discretionary review, permit the Secretary of Labor to file an amicus curiae brief, and heard cor dated oral argument in this matter and two other compensation cases decided this date, Westmoreland, supra, and Loc. U. 1609, Dist. 2, U v. Greenwich Collieries, Div. of Pennsylvania Mines Corp., Docket No PENN 84-158-C. We now reverse.

In Westmoreland we examine thoroughly the language, structure, purposes of section 111, and its third sentence in particular. The material issues presented in the instant matter are identical to iss resolved in Westmoreland and that decision, accordingly, controls ou disposition here.

For the reasons stated in Westmoreland, slip op. at 7-11, we ag in result with the judge that the initial section 103(k) control orc did not preclude, for safety or compensation purposes, the subsequer issuance of the section 107(a) imminent danger withdrawal order. Th orders had concurrent operation and effect. For purposes of the thi sentence of section 111, the mine was closed by and the miners were idled due to the subsequent section 107(a) order.

4/ On March 26, 1984, MSHA issued one section 104(d)(1) citation a four section 104(d)(1) withdrawal orders, three of which alleged tha the cited violations had resulted in a methane ignition, which caus the explosion on June 21, 1983, at the McClure mine. Clinchfield di not contest the citation or orders and paid $47,500 in civil penalti (No issues are presented in this proceeding regarding the validity o the citation or orders.)

a mandatory standard in order to trigger entitlement to one-week compensation. We conclude, in accordance with Westmoreland, that allegations of violation cited subsequently by MSHA may supply the required nexus under section 111 between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. Westmoreland, slip op. at 13-14.

As noted above, Clinchfield did not contest the subsequently issued section 104(d)(1) citation and three section 104(d)(1) withdrawal orders. Instead, it paid the penalties proposed by the Secretary. Both the Secretary and the UMWA have asserted that those allegations of violation cited in the section 104(d) citation and orders supply the required causal nexus between the imminent danger order and an underlying violati for purposes of entitlement to one-week compensation. That question now remains to be determined in this matter.

Accordingly, we remand this proceeding to the Chief Administrative Law Judge for assignment to himself or another Commission administrative law judge to determine whether the violations referenced above provide the required causal nexus between the section 107(a) imminent danger order and an underlying violation of a mandatory standard. If such a relationship is found, the presiding judge shall take appropriate action to identify affected miners and determine the amount of compensation due to each miner.

with this decision. 3/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ Commissioner Ford did not participate in the consideration or disposition of this case.

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v.	:	Docket No. WEVA 81-256-C
WESTMORELAND COAL COMPANY	:	

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), raises important issues concerni the compensation provisions of section 111 of the Mine Act. 30 U.S.C. § 821. 1/ The United Mine Workers of America ("UMWA" or "Union") seek

1/ The first four sentences of section 111 provide:

Entitlement of miners to full compensation

[1] If a coal or other mine or area of such mine is closed by an order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section [104] ... or section [107] of this [Act] for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled

seeks to link to an imminent danger withdrawal order issued following a explosion at one of Westmoreland's underground coal mines. Former Comm sion Administrative Law Judge Richard C. Steffey dismissed the UMWA's compensation complaint, holding that: (1) for purposes of determining entitlement to compensation, the miners in question were not idled by the imminent danger order issued pursuant to section 107(a) of the Act but by a withdrawal order previously issued pursuant to section 103(j);

Footnote 1 end.

by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section [103] ..., section [104] ..., or section [107] of this [Act], all miners employed at the affecte mine who would have been withdrawn from, or prevented from enterir such mine or area thereof as a result of such order shall be entit to full compensation by the operator at their regular rates of pay in addition to pay received for work performed after such order wa issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated.

30 U.S.C. § 821 (sentence numbers and emphasis added).

2/ Section 103(j) provides:

Accident notification; rescue and recovery activities

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evide which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j) (emphasis added). Orders issued pursuant to sectio 103(j) or section 103(k), 30 U.S.C. § 813(k), are commonly referred to as "control orders" since, as discussed infra, they are the means by which the Secretary may take initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

107(a) order and the violation of a mandatory standard. 6 FMSHRC 2 (September 1984)(ALJ). For the reasons explained below, we conclud that the judge erred in his resolution of each of these questions a reverse and remand.

I.

Facts and Procedural History

The facts were stipulated by the parties and are set forth in judge's Second Summary Decision. 6 FMSHRC at 2194-96. Briefly, an explosion occurred at approximately 3:30 a.m. on November 7, 1980, Westmoreland's Ferrell No. 17 underground coal mine located in West Virginia. At 7:30 a.m. on November 7, Inspector Eddie White of the Department of Labor's Mine Safety and Health Administration ("MSHA" issued a section 103(j) withdrawal order that applied to the entire mine. The section 103(j) order provided:

> An ignition has occurred in 2 South off 1 East. This was established by a power failure at 3:30 a.m. and while searching for the cause of the power failure, smoke was encountered in the 2-South section. Five employees in the mine could not be accounted for. [The area or equipment involved

Footnote 2 end.

(a) Withdrawal orders

If, upon any inspection or investigation of a coal or oth mine which is subject to this [Act], an authorized representat of the Secretary finds that an imminent danger exists, such re sentative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiri the operator of such mine to cause all persons, except those r to in section [104](c) of this [Act], to be withdrawn from, an be prohibited from entering, such area until an authorized rep sentative of the Secretary determines that such imminent dange the conditions or practices which caused such imminent danger longer exist. The issuance of an order under this subsection not preclude the issuance of a citation under section [104] of [Act] or the proposing of a penalty under section [110] of thi [Act.]

One half-hour later, at 8:00 a.m., Inspector White issued a sect 107(a) imminent danger withdrawal order also covering the entire The order, which did not allege a violation of any mandatory hea safety standard, stated:

> All evidence indicates that an ignition of unknown sources has occurred and five employees cannot be accounted for.

The bodies of the five miners were recovered on November 8, and the 2-South area of the mine was sealed off. Both withdrawa were modified on December 10, 1980, to cover "the seals and area the seals." On July 15, 1982, twenty months after the explosion issued 13 section 104(d)(2) withdrawal orders citing violations mandatory standards based on sworn statements taken during MSHA' investigation of the mine explosion. 3/ The section 107(a) orde not modified to allege violations of mandatory standards, and wa terminated on November 15, 1983.

3/ Section 104(d) provides:

> Findings of violations; withdrawal order
>
> (1) If, upon any inspection of a coal or other mine, authorized representative of the Secretary finds that there been a violation of any mandatory health or safety standard he also finds that, while the conditions created by such vi do not cause imminent danger, such violation is of such nat could significantly and substantially contribute to the cau effect of a coal or other mine safety or health hazard, and finds such violation to be caused by an unwarrantable failu such operator to comply with such mandatory health or safet standards, he shall include such finding in any citation gi the operator under this [Act]. If, during the same inspect any subsequent inspection of such mine within 90 days after issuance of such citation, an authorized representative of Secretary finds another violation of any mandatory health standard and finds such violation to be also caused by an able failure of such operator to so comply, he shall forth

(footnote 3 continued)

mine explosion. The UMWA's complaint, as later amended, sought, among other things, the limited compensation available under the second senten of section 111 ("shift compensation") for the miners idled on the Novemb day shift, and one week's compensation under the third sentence of section 111 ("one-week compensation") for all of the idled miners.

On April 28, 1982, the judge issued a Summary Decision, in relevant part granting shift compensation for the miners idled on the November 7 day shift but dismissing without prejudice the Union's claim for one-wee compensation on the grounds that the section 107(a) order did not allege a violation of a mandatory standard. 4 FMSHRC 773, 776-79, 784-88 (April 1982)(ALJ). The judge noted that there was "nothing to prevent UMWA from filing a complaint for a week of compensation under the third sentence of section 111 if and when MSHA does modify [the] outstanding imminent-danger order ... to allege one or more violations of the mandat health and safety standards by Westmoreland." 4 FMSHRC at 789. The judge denied the UMWA's request that he retain jurisdiction of the case and defer final decision pending completion of MSHA's investigation into the causes of the mine explosion. 4 FMSHRC at 788-89. The UMWA filed with the Commission a petition for discretionary review, which was granted on June 6, 1982.

Footnote 3 end.

issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdraw order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existenc in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d).

case to the judge with instructions [illegible] the parties to make any appropriate motions or showings upon the c pletion of MSHA's investigation. Loc. U. 1889, Dist. 17, UMWA v. Westmoreland Coal Co., 5 FMSHRC 1406, 1410-13 (August 1983). The Commission noted the issuance of the 13 section 104(d)(2) orders 1982, but expressed no view at that time as to "whether these thi 104(d)(2) orders or any later modification of the 107(a) Order .. provide the basis for [one-week] compensation under the third sen section 111." 5 FMSHRC at 1413.

In the consolidated notice of contest and civil penalty proc involving review of the 13 section 104(d)(2) orders (Docket Nos. 82-340-R, etc.), Judge Steffey vacated the orders, concluding tha they had been improperly issued under section 104(d), but he uphe assertions of violation underlying the vacated orders. In a late approving settlement, the judge approved Westmoreland's agreement civil penalties totalling $38,000 for the violations alleged in t vacated section 104(d) orders. 6 FMSHRC 1267 (May 1984)(ALJ).

In his decision on remand from the Commission in the compens proceeding, the judge again denied the UMWA's claim for one-week compensation. The judge determined that the miners had been with by the section 103(j) order, not by the section 107(a) order issu half-hour later, and that "[t]herefore, UMWA cannot satisfy the f prerequisite under the third sentence of section 111 which requir showing that miners were withdrawn and idled by the 107(a) order. 6 FMSHRC at 2201. The judge further concluded that even if the m had been withdrawn by the section 107(a) order, it neither allege the time of its issuance, nor had it been modified prior to its t tion to allege, a violation of a mandatory standard, another prer in the judge's view, for one-week compensation under section 111. 6 FMSHRC at 2202. Despite Westmoreland's payment of civil penalt settlement of the underlying allegations of violation contained i 13 vacated section 104(d) orders (supra), the judge opined that t orders could not "be said to allege violations as part of an immi danger order because [the section 104(d) orders] could not have b issued in the first instance without a finding that the violation in the order did not cause an imminent danger." Id.

We granted the petition for discretionary review filed by th and heard consolidated oral argument in this matter and two othe compensation cases also decided this date, Loc. U. No. 2274, Dist v. Clinchfield Coal Co., Docket No. VA 83-55-C, and Loc. U. 1609 UMWA v. Greenwich Collieries, Div. of Pennsylvania Mines Corp., No. PENN 84-158-C.

order from serving as a necessary prerequisite for entitlement to or compensation under the third sentence of section 111; (2) whether a section 107(a) order must allege, or be modified prior to its termination to allege, a violation of a mandatory health or safety standa in order to trigger entitlement to one-week compensation; and (3) wh a subsequent allegation by the Secretary of a violation of a mandato standard in a separate citation or order may provide the nexus betwe the issuance of the 107(a) order and an underlying violation.

These questions center around the meaning of a few key words in third sentence of section 111 (n.1 supra): What are the relationshi intended by the statutory references to a mine being closed "by" a section 104 or 107 order, the miners being idled "due to" such an or and the order itself having been issued "for" a violation of a stand 30 U.S.C. § 821 (emphasis added throughout). In our view, the meani of these words becomes clear when they are viewed in the proper cont of section 111 as a purposive whole.

A. The sequence of withdrawal orders

We turn first to the judge's conclusion that the miners had alr been idled officially as a result of the prior issuance of the secti 103(j) "control" order and, therefore, for purposes of entitlement t one-week compensation, could not have been idled as a result of the subsequent section 107(a) order as required for such entitlement und the third sentence of section 111.

Section 111 is remedial in nature and was not intended by Congr to be interpreted and applied narrowly. The key Senate Report on th bill that was enacted as the Mine Act states:

> Miners[']entitlement resulting from closure orders
>
> As the Committee has consistently noted, the primary objective of this Act is to assure the maximum safety and health of miners. For this reason, the bill provides at Section 11[1] that miners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision, drawn from the Coal Act, is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations, or because of an imminent danger which was totally outside their control.

> furnishes added incentive for the operator to comply with the law. This provision will also remove any possible inhibition on the inspector in the issuance of closure orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 46-47 (1977)("S. Rep."), re
Senate Subcommittee on Labor, Committee on Human Resources, 95th C
2d Sess., Legislative History of the Federal Mine Safety and Healt
1977, at 634-35 (1978) ("Legis. Hist.")(emphasis added). As the C
has stated previously, "Section 111 is designed to promote safety
protect lives...." Loc. U. No. 781, Dist. 17, UMWA v. Eastern Ass
Corp., 3 FSHRMC 1175, 1178 (May 1981). The judge's formalistic em
on the sequencing of relevant withdrawal orders and his imputation
preclusive effect to the order issued first in time cannot be squa
with the language, structure, and purpose of section 111 and other
pertinent provisions of the Mine Act.

We have no difficulty with the proposition that only the spec
types of withdrawal orders listed in each of the first four senten
section 111 may serve as prerequisites for entitlement to the form
compensation mentioned respectively in those sentences. Neverthel
the focus of section 111 as a whole is on the operator's conduct a
relates to conditions in the mine -- not the chronology of the Sec
official actions in response to mine accidents or emergencies. Mo
section 111 contemplates in furtherance of safety that section 103
control orders and other relevant withdrawal orders have concurren
rather than mutually exclusive, operation and effect.

Section 111 creates a graduated scheme of compensation tying
compensatory entitlement to increasingly serious operator conduct.
Thus, upon a mine closure and idlement attributable to the issuanc
section 103, 104, or 107 order, the limited shift compensation des
in the first sentences of section 111 is awardable "regardless of
result of any review of such order...." 30 U.S.C. § 821. If, how
the closure and idlement is attributable to a section 104 or 107 o
"issued ... for a failure of the operator to comply with any manda
... standard," the entitlement under the third sentence of section
is to one-week compensation. Id. Finally, and most seriously, if
operator fails to comply with a section 103, 104, or 107 order, th
miners who otherwise would have been withdrawn are to be paid the
compensation specified in the fourth sentence of section 111 in ad
to their regular pay, until such time as the order is complied wit
vacated, or terminated. The primary emphasis that we discern in t
scheme is upon what the operator has done, not on any expressed co
over the particular sequencing of the issuance of various types of

U.S.C. § 820(a)(1976)(amended 1977). Sections 103(e) & (f) of the 19 Coal Act, 30 U.S.C. §§ 813(e) & (f)(1976)(amended 1977), were the con order provisions analogous to sections 103(j) & (k) of the Mine Act. interpreting the meaning and interplay of these 1969 Coal Act provisi in circumstances analogous to the present case, the Board held:

> The miners in the instant case were officially withdrawn by the 103(f) [control] order. However, they were also officially withdrawn by the [subsequent] section 104(c) [unwarrantable failure withdrawal] orders. The language in section 110(a) of the Act allows compensation to miners who are "idled" by a 104(c) order. There is nothing in the language of that section to indicate that compensation for miners will not lie when there are two different orders of withdrawal in effect concurrently. Additionally, that section does not require the 104 order to be the first official one. Sequence ... is not the essence of the applicability of section 110(a).

Roscoe Page v. Valley Camp Coal Co., 6 IBMA 1, 6 (1976)(emphasis adde In addressing similar issues under the 1969 Coal Act, the Commission also adopted the approach that initial control orders and other subse compensation-qualifying withdrawal orders operated "concurrently." Peabody Coal Co., etc., 1 FMSHRC 1785, 1790 (November 1979).

In Loc. U. No. 781, etc. v. Eastern, supra, a compensation case arising under the Mine Act, the Commission applied the concept of "ne to determine the causative relationship between the operation of with orders and idlements. The Commission stated, "[S]ection 111 compensa is awardable only if there is a nexus between a designated withdrawal order and the miners' idlement ..., or between the underlying reasons for the idlement ... and the reasons for the order." 3 FMSHRC at 117 The Commission defined "nexus" in terms of a "significantly substanti relationship" between idlement and withdrawal order "to support a sec 111 award." Id. Rather than establishing an inflexible nexus requir the Commission specifically recognized the possibility of "more compl sequences of events or concurrent operation of causative factors." I (Emphasis added.) The Commission held: "In such cases, we will exam the relationship between the underlying reasons for the withdrawal an for the order, and will give balanced consideration both to the ...

the Mine Act and section 111 and the compensatory character of section 111. From the standpoint of safety, the section 103 order gave the Secretary immediate control of the mine, under the emergency circumstance of the explosion, in order to take whatever actions he deemed necessary in protecting lives and directing rescue and recovery operations. From a compensatory standpoint, that order (as the judge correctly concluded in his first summary decision) initiated whatever compensation was available under the first two sentences of section 111. The section 107(a) order, issued one half-hour later upon a finding of imminent danger, required the operator, for safety reasons, to withdraw the miners from the affected area until the Secretary determined that the imminent danger and its causes no longer existed. For compensation purposes, the imminent danger order initiated the possibility of entitlement under the third sentence of section 111. We find nothing in the statute or in its legislative history to suggest that an existing section 103 order precludes the issuance of a valid and effective section 107(a) order either for purposes of mine safety or compensation entitlement under the third sentence of section 111. 4/

4/ In Roscoe Page, supra, the Board spoke to similar effect in resolvin analogous issues under the 1969 Coal Act:

> Section 103(f) [control orders] and 104(c) [withdrawal] orders are designed to achieve different ends. Clearly, by its own languag section 103(f) operates to provide the inspector with emergency powers in the exigencies of a situation wherein there is a mine accident for the purpose of protecting the health and safety of persons in the coal mine. A section 104(c) order, in addition to protecting the health and safety of miners, operates to provide a sanction for a recalcitrant operator's unwarrantable failure to comply with the mandatory standards found in the Act and regulations Further, a 104(c) order in combination with section 110(a), operates to provide compensation for miners forced to lose work due to this unwarrantable failure. The sequence of 103(f) and 104 orders bears no relationship to the manner in which sections 104 and 110(a) operate together. ... [T]he issuance of a 104(c) order, for purpose of section 110(a)[,] has the effect of officially idling the miners even though, in fact ... they have first withdrawn in compliance with a 103(f) order. Ergo, the miners in this matter were officiall "idled" for the purposes of section 110(a) by the 104(c) orders of withdrawal upon their issuance notwithstanding the prior withdrawal required by the 103(f) order.

IBMA at 6-7.

expanded one-week compensation beyond the more limited shift compensation available under the first two sentences of the section. Stated otherwise, we believe that Congress did not intend section 103 control orders, usually issued first in time under exigent circumstances, to have compensation-precluding effects. The focus, as stated above, is upon the conduct of the operator and the conditions in the mine, not th sequencing of MSHA enforcement activity.

The record in this matter is clear that the section 107(a) order was issued as the result of a finding of imminent danger, which requir that the miners remain withdrawn until the imminent danger and its causes were determined to no longer exist. We agree with the judge that, for compensation entitlement under the first two sentences of section 111, the mine was closed "by" and the miners officially were idled "due to" the section 103(j) order. We conclude, however, that fo compensation purposes under the third sentence of section 111, the min also was closed "by" and the miners also officially were idled "due to" the section 107(a) imminent danger order of withdrawal. In short, the section 103 and 107 orders operated concurrently. We reverse the judg findings to the contrary.

B. The violation of a mandatory standard

We next address the question of whether, as the judge held, the section 107(a) order itself must allege, or be modified to allege, the violation of a mandatory standard.

The third sentence of section 111 provides that a claim for one-w compensation comes into play when a mine is closed by an order issued under section 104 or section 107 "for a failure of the operator to comply with any mandatory health or safety standards." 30 U.S.C. § 82 (emphasis added). The judge adopted a restrictive interpretation of th term "for", holding that the section 107(a) order as issued, or as subsequently modified prior to its termination, must itself allege the violation of a mandatory standard. On review, the UMWA contends that the language and the legislative history of sections 104(a), 107(a) an 111 permit the necessary allegation of violation of a mandatory standa to be cited under section 104 of the Mine Act independently from, and subsequent to, the issuance of a section 107(a) order. We agree.

The last sentence of section 107(a) (n.2 supra) expressly states that the issuance of an order under that subsection "shall not preclud the issuance of a citation under section 104...." 30 U.S.C. § 817(a). The legislative history of section 104(a) recognizes that occasions ma occur "where a citation will be delayed because of the complexity of

withdrawal of miners, and that, due to the dangerous conditions giving rise to the order, inspection or investigation of the area to determine the existence of any underlying violations may be delayed necessarily until long after the order was issued or until the imminent danger no longer exists. S. Rep. 38, reprinted in Legis. Hist. 626.

Thus, neither the statute nor the pertinent legislative history requires that for the purpose of one-week compensation the violative conditions causing or underlying the issuance of the section 107(a) order be cited in the order itself or its modification. Although it would have been procedurally possible, once the imminent danger and its causes no longer existed, for the Secretary to have modified the order pursuant to section 107(d), 30 U.S.C. § 817(d), and, upon completion of further investigation, to have cited violations under that modified order, we find no basis to conclude that a separately issued allegation of violation under section 104 is fatally defective in establishing the nexus between the withdrawal order and the violation of a mandatory standard.

We emphasize that section 111 is premised upon a congressional intent to expand rather than contract the compensation that was available under section 110(a) of the 1969 Coal Act. As noted, under the 1969 Coal Act, one-week compensation was available only for an idlement attributable to an unwarrantable failure order. A broader range of orders may trigger the same entitlement under the Mine Act. Further, the Senate Conference report on the bill that became the Mine Act refle a broad interpretation of the word "for" by describing one-week compensation as being available "in the event the withdrawal order was the result of a failure of the operator to comply with a mandatory health safety standard...." Conf. Rep. No. 461, 95th Cong., 1st Sess. 59 (197 reprinted in Legis. Hist. 1337 (emphasis added).

Congress could have chosen words restricting the one-week compensation entitlement in section 111 to a designated order of withdrawal that specifically alleged a violation of a mandatory standard, but ther is no indication, in the legislative history or in the final language the section, that it wished to do so. We reverse the judge's holding that violation of a mandatory standard must be alleged in a section 107(a) order or in a modification of such order prior to its terminati in order to initiate compensation under the third sentence of section 111. 5/

5/ We find Westmoreland's reliance on Billy F. Hatfield v. Southern Ohio Coal Co., 4 IBMA 259 (1975), aff'd sub nom. District 6, UMWA v. IBMA, 562 F.2d 1260 (D.C. Cir. 1977), to be misplaced. In Hatfield, a

Finally, we turn to the question of whether the allegations of violation of mandatory standards contained in the section 104(d) order issued to Westmoreland could constitute a nexus with the section 107(a) order for compensation purposes. Although conceding that "several of those orders cite Westmoreland for violations which may have contributed to the explosion" (6 FMSHRC at 2198), the judge nevertheless concluded that those allegations of violation could not be linked to the section 107(a) order.

The UMWA contends that it is irrelevant to the question of compensation that the violations of mandatory standards were cited in section 104(d) orders, because the issue here is not the validity of those orders but whether the alleged violations were related to the mine explosion that led to the issuance of the section 107(a) order. Westmoreland notes that all of the orders were vacated and that the underlying violations were resolved in a civil penalty settlement. Westmoreland argues that no causal relationship exists between those violations and the section 107(a) order for purposes of the present proceeding.

We conclude that form in which the violation of a mandatory standard is cited -- whether in a section 104(d) citation or order or in a section 104(a) citation -- is not controlling for compensation purposes. As the judge correctly recognized in his Decision Approving Settlement, the allegations of violation of mandatory standards cited in the orders survived his vacation of the orders themselves. 6 FMSHRC at 1270. As

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Footnote 5 end.

case involving a one-week compensation claim under the 1969 Coal Act, the mine had been closed by an imminent danger order of withdrawal issued pursuant to section 104(a) of that Act. 30 U.S.C. § 814(a) (197 (amended 1977). As already noted, under that statute, only a section 104(c) order of withdrawal for unwarrantable failure could trigger one-week compensation. The UMWA attempted to show that the section 104(a) imminent danger order actually had been based on a condition or practice resulting from the operator's unwarrantable failure to comply with a standard. The court affirmed the decision of the Board that the statute specifically limited one-week compensation to idlements attributable to orders issued pursuant to section 104(c). 562 F.2d at 1263-6 In our view, an important fact distinguishing Hatfield from the present issue is that in Hatfield the UMWA was attempting to usurp the prosecu responsibility of the Secretary of the Interior with respect to issuan of a section 104(c) order, by alleging and attempting to prove unwarra

states that the violations were alleged in 13 withdrawal orders all issued on July 15, 1982, by an MSHA inspector on the basis of his examination of sworn statements obtained by MSHA investigators in December 1980, and pertain to conditions that the inspector found contributed to the mine explosion of November 7, 1980. 6 FMSHRC at 1269, 1270. In the settlement agreement, Westmoreland paid in full the proposed penalty assessments for five violations, and agreed to pay reduced penalties for the other eight violations. 6 FMSHRC at 1270-127 Westmoreland's payment of civil penalties for these alleged violations established, for purposes of any proceeding under the Mine Act, that those violations of the Act occurred. See Old Ben Coal Co., 7 FMSHRC 205, 209 (February 1985); Amax Lead Company, 4 FMSHRC 975, 977-80 (June 1982).

Left unresolved, however, is the specific question of whether any of these charges of violation of mandatory standards in fact provide th necessary relationship to the section 107(a) order so as to initiate compensation under the third sentence of section 111. The judge's decision concerning the civil penalty criteria for each of the subsequently alleged violations concludes only that several of the violations may have contributed directly to the mine explosion, while others probably would not have contributed to the cause of the explosio 6 FMSHRC at 1270-1274.

Because the relationship or nexus between the violations of mandat standards and the imminent danger order is the critical issue on which statutory entitlement to one-week compensation hinges, we remand to the Commission's Chief Administrative Law Judge for further proceedings by him or by another judge. The assigned judge may reopen the record of this proceeding and take whatever further action is deemed necessary to determine whether any of the conditions involved in the violations of mandatory standards were sufficiently related to the mine explosion and the section 107(a) imminent danger order so as to constitute the requir causal nexus. If such a relationship is determined, the judge shall take appropriate action to identify the affected miners and the amount of compensation due to each. 6/

6/ This case does not require us to resolve, and we intimate no views as to, issues concerning the technical requirements necessary for issua of valid section 104(d) orders.

Conclusion

For the foregoing reasons, the judge's decision is reversed. This matter is remanded to the Chief Judge for proceedings consistent with this decision. 7/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. CENT 86-49
Petitioner	:	A.C. No. 03-01599-03501
	:	
v.	:	No. 1 Mine
	:	
S COAL COMPANY,	:	
Respondent	:	

DECISION

earances: Max A. Wernick, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner; Coy J. Rush, Jr., Esq., Hixon, Cleveland & Rush, Paris, Arkansas, for Responden

ore: Judge Broderick

TEMENT OF THE CASE

The Secretary of Labor seeks civil penalties for six alle lations of mandatory health and safety standards cited on ober 28, 1985. Respondent contends that it was not subject Act at the time of the alleged violations, and denies that lated the standards as alleged. Pursuant to notice, the ca heard on the merits on August 14, 1986 in Fort Smith, ansas. Lester Coleman testified on behalf of the Secretary ky Brown testified on behalf of Respondent. Both parties ved their rights to file posthearing briefs. I have sidered the entire record and the contentions of the partie make the following decision.

DINGS OF FACT

1. At all times pertinent to this proceeding, Respondent the operator of a surface coal mine in Sebastian County, ansas, known as the No. 1 Mine.

2. The mine was opened and an MSHA ID Number was issued ut October 10, 1985. Prior to that date, Respondent had rated a surface coal mine in Lamar, Arkansas. Coal was las oved from the Lamar mine in May or June 1985. Thereafter,

3. The R&S Mine at Lamar had approximately 5 to 6 em
It had been inspected by MSHA since about 1980. It had fi
equipment at the mine, and had made arrangements for emerg
medical and ambulance facilities at the mine. It had file
copy of a ground control plan with MSHA, had sanitary toil
facilities and had been granted a waiver by MSHA for bathi
facilities. A mine office was maintained at the Lamar Min

4. As of October 28, 1985, no coal had been removed
the No. 1 Mine. Some of the overburden covering the coal
had been removed, namely part of the topsoil. Three emplo
were at the mine site on October 28, 1985 and were doing
mechanical work on mining equipment. A caterpillar bulldo
a Michigan Front End loader were on the mining property.
topsoil had been removed by the bulldozer, and no blasting
been performed as of October 28.

5. Respondent sells its entire output of coal to the
Arkansas Charcoal Company in Paris, Arkansas. The Charcoa
sold in states other than Arkansas. The subject mine prod
about 2000 tons of coal from October 1985 to March 30, 198
4000 to 5000 tons from April to June 1986. Approximately
tons had been produced between the date the mine was opene
the date of the hearing.

6. Equipment used in the mine include 1 D-8 and 1 D-
Caterpillar bulldozer, a Michigan Frontend loader, a track
and a John Deere Road digger. This equipment and the repl
parts for it were manufactured outside of the State of Ark

7. Citations were issued for safety violations at th
plant, but there is no evidence as to their number. There
been no lost time accidents at Respondent's mines in the p
four years.

8. Prior to the time the No. 1 Mine was opened, MSHA
inspector Lester Coleman informed the Superintendent that
to get the required paper work into the MSHA office. The
Inspector gave him a packet containing instructions and th
necessary forms.

9. On October 28, 1985, Federal Mine Inspector Colem
issued Citation No. 2339807 charging a violation of 30 C.F
§ 77.1707(a) because there was no first aid equipment at t
site. The equipment was located at the Lamar mine and

medical assistance for any person injured at the mine. Suc
arrangements were effected on October 29, 1985, and the ord
terminated on October 30.

11. The subject mine was located in a remote area, bu
there was a medical clinic located in a town 5 miles away,
another 15 mines away.

12. On October 28, 1985, Inspector Coleman issued ord
2339811, charging a violation of 30 C.F.R. § 77.1702(b) bec
Respondent failed to make arrangements for ambulance servic
otherwise provide for 24-hour emergency transportation. Th
order was terminated October 30, 1985, when Respondent made
arrangements for 24-hour emergency transportation.

13. On October 28, 1985, Inspector Coleman issued cit
2339812 because Respondent did not file a copy of the groun
control plan for the subject mine with MSHA. Respondent's
superintedent stated that he was unaware of the requirement
the ground control plan be filed. The citation was termina
when the plan was filed on October 30, 1985.

14. On October 28, 1985, Inspector Coleman issued cit
2339813 and 2339814 because Respondent did not provide bath
facilities or sanitary toilets for the miners, and because
not maintain a mine office at the mine site. These citatio
were terminated on October 29, 1985 when Respondent provide
sanitary toilet at the mine, and applied for a waiver of th
bathing facilities requirement.

ISSUES

1. Whether Respondent is subject to the provisions of
Mine Safety Act in the operation of its No. 1 Mine?

2. Whether Respondent violated the safety standards a
alleged, and if it did, what are the appropriate penalties
the violations.

CONCLUSIONS OF LAW

1. Respondent was at all times pertinent to this proc
subject to the provisions of the Act, and I have jurisdicti
over the parties and subject matter of this proceeding.

ect commerce is subject to the Act. The fact that pondent's coal is sold entirely intrastate does not remove it m the Act's requirements. See Wickard v. Filburn, 317 U.S. (1942); Marshall v. Bosak, 463 F. Supp. 800 (E.D. Pa. 1978); retary v. Valley Limestone Co., 4 FMSHRC 357 (1982) (ALJ). pondent used substantial amounts of equipment which originate of state. Its products, although originally sold intrastate e ultimately used both intrastate and out of state. The dence clearly establishes that its operations affect erstate commerce.

2. The violations cited are not seriously disputed. I clude that the six violations involved in this proceeding urred.

3. The failure to have the required first aid supplies and ipment at the mine site, the failure to make arrangements for rgency medical care and the failure to make arrangements for ulance service are all moderately serious violations under th cumstances of this case. Each of these violations could have ulted in serious injuries to miners.

4. Each of the six violations involved herein resulted fro pondent's negligence. It knew or should have known of the uirements of the Act and the regulations, and failed because carelessness to take the necessary steps to avoid the lations.

5. Respondent is a small operator, does not have a nificant history of pervious violations, and promptly abated violations after being cited.

ORDER

Based on the above findings of fact and conclusions of law, considering the criteria in section 110(i) of the Act, I clude that the following penalties are appropriate.

ATION/ORDER	PENALTY
9809	$ 150
9810	150
9811	150
9812	50
9813	30

James A. Broderick
James A. Broderick
Administrative Law Judge

ibution:

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	:	Docket No. KENT 86-11-C
v.	:	
	:	Camp No. 2 Mine
BODY COAL COMPANY,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Broderick

On September 4, 1986, the UMWA on behalf of the complainant filed a Motion to Withdraw the complaint for compensation on the ground that the complainants have been compensated each in the amount of $21.69 for the loss of pay claimed on August 9, 1984.

Premises considered, the Motion is GRANTED, and this proceeding is DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution:

Joyce A. Hanula, Legal Assistant, United Mine Workers of America, 900 15th St., N.W., Washington, D.C. 20005 (Certified Mail)

Michael A. Kafoury, Esq., Peabody Coal Co., P.O. Box 373, St. Louis, MO 63166 (Certified Mail)

EMERY MINING CORPORATION, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 83-6-R
v.	:	Citation 9946565; 9/13/
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 83-7-R
	:	Citation 9946569; 9/17/
	:	
	:	Docket No. WEST 83-8-R
	:	Citation 9946571; 9/21/
	:	
	:	Deer Creek Mine
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI
	:	
	:	Docket No. WEST 83-33
	:	A.C. No. 42-00080-0351
	:	
	:	Docket No. WEST 83-36
v.	:	A.C. No. 42-00080-0351
	:	
	:	Docket No. WEST 83-51
EMERY MINING CORPORATION, Respondent	:	A.C. No. 42-00080-0351
	:	
	:	Wilberg Mine
	:	
	:	Docket No. WEST 83-34
	:	A.C. No. 42-00121-0350
	:	
	:	Docket No. WEST 83-42
	:	A.C. No. 42-00121-0350
	:	
	:	Docket No. WEST 83-57
	:	A.C. No. 42-00121-0351
	:	
	:	Deer Creek Mine

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

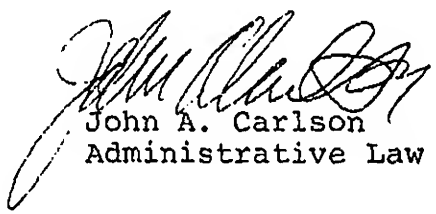
These consolidated cases have been on stay pending the issuance of a Commission decision bearing upon a principal

Specifically, Emery Mining Corporation agrees to pay t entire civil penalty proposed by the Secretary in each of t penalty cases.

Further, conditioned upon the Commission's approval of that part of the settlement relating to the penalty cases, also moves to withdraw its notices of contest in the three test cases shown in the caption.

Based upon the representations of the parties and the c of the files, I conclude that the settlement is appropriate should be approved in all respects.

Accordingly the settlement agreement (including the wi drawals) is approved in all respects and the attendant moti are granted. Respondent shall therefore pay a total civil of $2,070.00 within 40 days of the date of this decision ap settlement. These proceedings are dismissed.



John A. Carlson
Administrative Law Judge

Distribution:

Timothy M. Biddle, Esq., Crowell & Moring, 1100 Connecticut N.W., Washington, D.C. 20036 (Certified Mail)

James H. Barkley, Esq., Office of the Solicitor, U.S. Depar of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

SEP 9 1986

MARTHA PERANDO, Complainant	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. YORK 85-12-I
	:	MSHA Case No. MORG CD 8
METTIKI COAL CORPORATION, Respondent	:	

DECISION

Before: Judge Melick

Pursuant to the decision in these proceedings dated August 12, 1986, the parties have submitted stipulations damages, costs and interest. Accordingly the Mettiki Coa Corporation is ordered to pay to Complainant Martha Perar the amount of $2,351.30 in back pay within 30 days of the date of this decision plus interest to the date of paymer computed in accordance with the formula set forth in Bail v. Arkansas Carbona, Co., 5 FMSHRC 2042 (1983), plus cost $50.

This decision constitutes the final disposition of these proceedings before this judge.

Gary Melick
Administrative Law Judge

Distribution:

Martha Perando, P.O. Box 3012, Deer Park, MD 21550 (Certi Mial)

Timothy Biddle, Esq., and Lisa B. Rovin, Esq., Crowell & Moring, 1100 Connecticut Avenue, N.W., Washington, DC 200 (Certified Mail)

rbg

SEP 10 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	:	DISCRIMINATION PROCEEDIN
	:	Docket No. WEVA 85-73-D
RONNIE D. BEAVERS, DONALD L. BROWNING, ROBERT L. CARPENTER, EVERETT D. CURTIS, LARRY L. EFAW, ROGER LEON ERWIN, CHARLES W. FOX, LESTER D. FREEMAN, LARRY F. HUFFMAN, HARRY EDWIN HURST, ROBERT HURST, GARY C. KNIGHT, LARRY LANTZ, DAVID R. MARTIN, MICHAEL L. MARRA, WILFORD MARSH, JR., DANNIE M. MAYLE, CHARLES W. McGEE, CHARLES F. MURRAY, WALTER F. MURRAY, LARRY NORRIS, CLARA Y. PHILLIPS, KENNETH D. SHOCKEY, RICHARD D. SNIDER, JESSE L. WARD, BEDFORD WILFONG, JR.,	:	MORG CD 84-1
	:	Kitt No. 1 Mine
Complainants	:	
v.	:	
KITT ENERGY CORPORATION,	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF AMERICA,	:	
Intervenor	:	

B. K. Taoras, Esq., Kitt Energy Corporation, Meadow Lands, Pennsylvania, for Respondent; Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for Intervenor.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon stipulated facts for a ruli on Cross Motions for Summary Decision, filed pursuant to 29 C.F.R. § 2700.64.

The issue presented is whether Kitt Energy Corporation (hereinafter referred to as "Kitt") violated section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act" 30 U.S.C. § 815(c), when it laid-off the complainants, who were surface miners, notwithstanding their seniority and technical ability to perform the remaining underground jobs available, solely because they required additional training under 30 C.F.R. Part 48 before they could perform those underground jobs for which they were otherwise qualified and entitled to.

At the time of the layoffs herein, Kitt was a party to the National Bituminous Coal Wage Agreement of 1981 (the "Agreement"). The Agreement provides in relevant part that in the case of a reduction in work force, "[e]mployees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work." However, section 115 of the Act, 30 U.S.C. § 825, and 30 C.F.R. Part 48 (the "Regulations") prescribe certain training which miners must receive before they can perform underground mining jobs.

Kitt took the position that although these complainants could have become qualified by receiving the appropriate training, the fact was that they did not have the qualifications to step in and perform the work at the time and, therefore, less senior employees who had the requisite training were given those positions. It is not disputed that had the terms of the Agreement been applied without regard to the federal training requirements, the complainan would not have been laid off.

receive mandatory training thereby discriminated against those miners who were laid off solely as a result of the application of the training requirements.

STATUTORY AND REGULATORY PROVISIONS

Section 115(a) and (b) of the Act provide as follows:

> (a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training program not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that--
>
> (1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned;
>
> (2) new miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device where appropriate, hazard recognition, emergency procedures, electrical hazards, first aid, walk around training and the health and safety aspects of the task to which he will be assigned;
>
> (3) all miners shall receive no less than eight hours of refresher training no less frequently than once each 12 months, except that

task in which he has had no previous work experience shall receive training in accordance with a training plan approved by the Secretary under this subsection in the safety and health aspects specific to that task prior to performing that task;

(5) any training required by paragraphs (1), (2), or (4) shall include a period of training as closely related as is practicable to the work in which the miner is to be engaged.

(b) Any health and safety training provided under subsection (a) shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

Section 3(g) of the Act provides:

For the purpose of this Act, the term--

* * *

"miner" means any individual working in a coal or other mine....

30 C.F.R. § 48.2 provides in pertinent part:

§ 48.2 Definitions

For the purposes of this Subpart A--

* * *

(b) "Experienced miner" means a person who is employed as an underground miner...on the effective date of these rules; or a person who has received training acceptable to MSHA from an appropriate State agency within the preceding 12

months experience working in an underground mine during the preceding 3 years; or a person who has received the training for a new miner within the preceding 12 months as prescribed in §48.5 (Training of new miners) of this Sub part A.

(c) "New miner" means a miner who is not an experienced miner.

STIPULATIONS

I accept the following stipulations of the parties and find same as the facts upon which this decision is based.

1. Complainants were employed as surface or underground miners by Kitt Energy Corporation at the Kitt Mine until their layoffs on either August 29, 1983, or September 6, 1983, as indicated for each complainant in Exhibit "C".

2. Respondent, Kitt Energy Corporation, is the owner and operator of the Kitt Mine at Philippi, West Virginia, an underground coal mine having Federal Mine I.D. No. 46-04168.

3. The parties hereto and the Kitt Mine are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. The United Mine Workers of America (UMWA) is the collective bargaining representative for certain employees at the Kitt Mine and is a representative of miners for the complainants for purposes of the Federal Mine Safety and Health Act of 1977 and this proceeding.

5. At all times relevant to this proceeding, the UMWA and Kitt Energy Corporation were parties to the National Bituminous Coal Wage Agreement of 1981.

6. On or about August 25, 1983, Mr. Donald Jones of Kitt Energy Corporation contacted MSHA for information regarding when a miner is considered "experienced" under MSHA's training regulations, located at 30 C.F.R. § 48.1 et seq. He was advised that the designation of "experi-

t 30 C.F.R. § 48.22(b).

7. On August 29, 1983, mine management invoked a reuction and realignment of the work force pursuant to rticle XVII of the Wage Agreement. The work force was educed from 565 to 210, resulting in the layoff of 355 ersons. This caused a reduction in the number of surface ositions from 91 to 59.

8. In determining which employees would be retained n the available jobs, mine management was bound by the age Agreement and the realignment procedure of Article VII. A criterion applied by mine management to Article VII to determine qualifications (ability to step in and erform the work of the job at the time) was that a miner ave the appropriate experienced miner designation. For ualification purposes, only "experienced underground iners" were considered able to step in and perform the ork of the underground positions at the time and only experienced surface miners" were considered able to step n and perform the work of surface positions. The terms experienced surface miners" and "experienced underground iners" were given the same meanings as defined in 30 C.F.R. 48.22(b) and 48.2(b), respectively.

9. Management's use of the appropriate "experienced iner" designation as mentioned in paragraph 5 to determine ob qualification at Kitt Mine was held not in violation of he Wage Agreement by Arbitrator Roger C. Williams in a ecision dated February 24, 1984.

10. The following complainants were among those who ere laid off on August 29, 1983:

Jesse L. Ward	Harry Edwin Hurst
Robert Hurst	Larry Lantz
Larry Norris	Charles McGee

11. Prior to and at the time of the August 29 reduction nd realignment of the work force, complainants, J. Ward, . Lantz, and C. McGee, were working at surface positions at he Kitt Mine and were "experienced surface miners" as deined in § 48.22(b). They were not "experienced underground iners" as that term is defined in § 48.2(b).

48.2(b) because of the grandfathering aspect of the pro-
sion. Nevertheless, they were laid off because of a lack
f knowledge of the grandfathering provision in the training
egulations.

13. On September 6, 1983, a second realignment occurred. he work force was reduced from 210 to 167 classified em-loyees. Surface positions were reduced from 59 to 15 posi-ions.

14. The same criteria to determine qualification for ob placement were used as for the August 29 realignment, owever, the "grandfathering" misunderstanding had been re-olved and those who were "grandfathered" were treated as xperienced miners.

15. On September 6, 1983, the following complainants, ho had been working at surface positions at the Kitt Mine nd who were "experienced surface miners" as defined in 48.22(b), were laid off because there was an insufficient umber of job openings in surface occupations, and they did ot have the ability to step in and perform underground ork because they were not "experienced underground miners" ithin the meaning of 30 C.F.R. § 48.2(b):

Huffman	Marra	Fox
Wilfong	Erwin	Beavers
Shockey	Curtiss	Freeman
Marsh	Carpenter	Browning
Martin	Mayle	Snider
W. Murray	Efaw	Phillips
G. Knight	C. Murray	

16. Had management, on August 29, 1983, and Septem-er 6, 1983, applied the terms of the collective bargaining greement, without regard to the application of 30 C.F.R. 48, the complainants would not have been laid off and ould have been placed in the remaining jobs according to rticle XVII of the Wage Agreement.

17. The complainants had the technical ability to erform the jobs that were available at the Kitt Mine after he reduction and realignment of the work force that oc-urred on August 29 and September 6, 1983.

rienced underground miners" under MSHA's regulations, each
mplainant except Efaw had worked underground at the Kitt
ne prior to taking a surface job. Mr. Efaw had no under-
ound employment with Kitt Energy prior to October 1983,
had underground experience elsewhere.

20. Exhibit "C" contains information pertinent to each
mplainant: name; employee number; seniority date and num-
; date laid off and the number of days of work missed;
title prior to layoff; recall date; job title upon re-
l and classification rate; amount of training received
experienced miner designation.

21. All the complainants would have been retained in
s had they been experienced underground miners within the
ning of 30 C.F.R. § 48.2(b).

22. On or about September 7, 1983, MSHA advised Kitt
t the layoff procedure conflicted with MSHA's training
uirements and those employees who were laid off because
training would have to be recalled even if it meant
mping" less senior employees who had been retained. No
ations were issued. Mine management disagreed with
A's position; however, management did as MSHA requested
order to limit the exposure to potential penalties and
ages.

23. On September 13, 1983, complainant, R. Beavers,
recalled to an outside position. He started work that
without any further training.

24. On September 14, 1983, Kitt recalled the com-
inants and gave them the training required to satisfy
"experienced" designation within the meaning of 30
.R. § 48.2(b).

25. All training was provided by Kitt. All employees
e paid for time spent in training at the rate for the
to which recalled.

DISCUSSION AND FINDINGS

The facts in this case are not in dispute. The law in
s area, however, is just now evolving. Three cases, in
rticular, are important to an analysis of the issue herein.

of Labor, 783 F.2d 155 (10th Cir. 1986). This case arose as a result of a change in the hiring policy at the Emery Mining Corporation. Under the new policy, effective January 1, 1980, Emery required completion of 32 of the 40 hours of safety training for underground miners mandated by section 115(a) of the Act as a pre-condition of employment. Furthermore, Emery did not reimburse those individuals who were eventually hired as miners either for the cost of the training or pay wages for the hours spent in obtaining it.

As a result, the Secretary filed a complaint of discrimination with the Commission against Emery on behalf of twelve Emery employees, each of whom had been hired after January 1, 1980, and each of whom had personally paid for their own training prior to being employed by Emery as a miner. The Commission administrative law judge found that Emery's policy of requiring job applicants to obtain the 32 hours of miner training at their own expense as a pre-condition for employment interferred with their right to receive such training because the Act places the responsibility for miner's training on the operator, and therefore discriminated against them in violation of section 105(c) of the Act. The Commission affirmed the judge's finding that Emery violated the Act by refusing to reimburse the complainants after they were hired for wages for the time spent in training and the cost of their training. However, the Commission disagreed with the judge's conclusion that Emery's policy of requiring the training as a pre-condition of employment violated the Act. In so holding, the Commission stated that although once hired, these complainants became new miners under the Act and entitled to the rights contained in sections 115(a) and (b), nothing in that section dictates whom an operator should hire. An employer has the right to choose its own employees.

On appeal from the order of the Commission, Emery contended that the Act requires compensation only for those individuals who receive training while they are miners and not those who receive that training prior to becoming miners. The United States Court of Appeals for the Tenth Circuit denied enforcement of the Commission's order holding that "because the complainants were not miners as defined by the Act, they are not entitled to compensation for the 32 hours of training they voluntarily undertook, 'lost wages,' and other expenses incurred in completing the

training did not violate the Act." Emery, 783 F.2d at 159.

The next cases concerning a similar issue to be decided by the Commission were both handed down on September 30, 1985, while their decision in Emery, supra, was still pending in the Tenth Circuit. United Mine Workers of America on behalf of Rowe, et al. v. Peabody Coal Co., 7 FMSHRC 1357 (1985), appeal docketed sub nom. UMWA on behalf of Rowe, et al. v. FMSHRC, Nos. 85-1714, et al. (D.C. Cir. Oct. 1985); and Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc., 7 FMSHRC 1348 (1985), appeal docketed sub nom. Secretary of Labor on behalf of Acton, et al. v. Jim Walter Resources, Inc. and FMSHRC, No. 86-1002 (D.C. Cir. Jan. 1986). In both of these cases, the issue presented for decision was whether an operator violated section 105(c) of the Act when it bypassed for rehire a laid-off individual because that person lacked the health and safety training specified in section 115 of the Act and 30 C.F.R. Part 48.

In the Peabody case, the Commission's chief administrative law judge found that laid-off miners were "miners" within the meaning of the Act and that therefore it was Peabody's responsibility to provide the training required by section 115 and Part 48 after rehire and that by denying recall because they were not trained, Peabody violated section 105(c)(1) of the Act. Because the Act does not specifically address the issue of the laid-off miner, the judge looked to the parties' collective bargaining agreement and concluded:

> [T]he rights accorded a laid off miner under the collective bargaining agreement contain indicia of an ongoing employment relationship sufficient for him to be considered a miner within the purview of section 115 and 105(c) of the Act.

6 FMSHRC at 1648.

The Commission disagreed and reversed. Consistent with their holding in Emery, they stated that section 115 does not dictate to operators whom they must recall any more than it dictates whom they must hire. That it is upon being rehired that laid-off miners once again become

violate section 105(c) of the Act.

In reaching this conclusion, the Commission went on to add that:

> [T]he Mine Act is not an employment statute. The Act's concerns are the health and the safety of the nation's miners. Those individuals employed at a mine are to be trained before they begin work so that once they begin work accidents are less likely to occur.

7 FMSHRC at 1364.

The facts of the Jim Walter case are very similar to Peabody, i.e., the alleged discrimination occurred when the operator recalled laid-off miners who had terms of company service shorter than the complainants, but who, unlike the complainants, had completed the underground safety training required by section 115 of the Act. The administrative law judge in Jim Walter held that the operator did not violate section 105(c) of the Act by requiring laid-off individuals to obtain the training as a condition of recall, holding that it was "immaterial whether the affected applicants for employment are strangers to the industry and the employer, as in the Emery case, or are former employees awaiting... recall...." 6 FMSHRC at 2453.

The Commission, consistent with their decisions in Peabody and Emery, affirmed.

Turning now to apply the facts of the instant case, as stipulated herein, to the existing law, it seems to me that several issues are now well settled by the decisions and do not require further analysis. Among these are that section 115 of the Act and Part 48 of the Regulations set forth certain mandatory training requirements for "miners", and it is the operator's responsibility to provide and pay for that training. Furthermore, section 105(c) prohibits denial of, or interference with, these training rights granted to "miners" by section 115.

The complainants herein were "miners" who were laid-off from surface mining positions as a result of the operator reducing and realigning its work force. At the time

ned, but although they had each spent some time previ-
ly as underground miners, they had spent the last few
rs in surface mining positions. The remaining available
s and those that are at issue in this case, however, were
underground jobs and thus these individuals would have
to be provided with the mandated safety and health
ining before they could perform those jobs, or have
erwise been designated "experienced underground miners"
the grandfathering provision of the Regulations.

The operator maintains that "the ability to step in
perform the job at the time" means that the miners in
stion in this case must have been "experienced under-
und miners" as defined in 30 C.F.R. § 48.2(b). As a
ctical matter, these complainants could have become
lified by receiving the appropriate training and there-
e their layoff resulted solely from the fact that they
ked this training. In fact, three of the complainants
ein, Harry Hurst, Robert Hurst, and Larry Norris, did
even require the new miner training as they were "ex-
ienced underground miners" by virtue of the grandfathering
vision contained in 30 C.F.R. § 48.2(b), but were laid-
anyway because the operator mistakenly believed they
.

Complainants herein contend that their layoff violated
tion 105(c) of the Act because it interfered with their
tutory right, under section 115, to be provided what-
r safety and health training they needed at operator
ense. They claim that the operator discriminated
inst them by distinguishing between its employees
iners") on the basis of their need to receive mandatory
ining under the Act.

The operator relies on the Tenth Circuit decision in
ry and the Commission decisions in Peabody and Jim
ter for support for its interpretation of sections 115
105 of the Act. However, those cases involved appli-
ts for employment, "strangers" to the industry and the
loyer (Emery), or laid-off employees (Peabody and
Walter). In my opinion the instant case is distin-
shable from those because this case involves "miners" who
e on "active duty" so to speak at the time the conduct
plained of occurred. The complainants in the aforemen-
ned cases were unemployed, at least initially, for rea-

the Act at the time the operator picked and chose among them based on the federal training requirements is a critical distinction and is decisive in this case. As "miners", the complainants herein were entitled to be provided whatever training was required under section 115. By laying of these complainants rather than providing the required train ing, the operator interfered with their statutory right to training under section 115. The insistence of the complainants on their right to be provided this training by the operator of the mine where they work is activity protected by the Act. Therefore, I find that the operator discriminated against the complainants by violating their statutory rights regarding training, as alleged.

Kitt is apparently attempting to use the Agreement's definition of seniority 2/ to justify its actions against these complainants. While it is plainly not the function this Commission to interpret that Agreement, I note that even if their interpretation of the contract is correct, i it conflicts with the statutory requirements of the Mine Safety Act, it is the Act that must prevail. The complainants possess rights which are accorded under section 115 of the Mine Act and which are protected under section 105(of that Act, irrespective and independently of any rights they may or may not have under the terms of their labor contract. The Agreement is only significant in this case the extent that it is undisputed that by its terms, the complainants herein would not have been laid-off, but for their lack of health and safety training.

Finally with regard to the three miners, Harry Hurst, Robert Hurst, and Larry Norris, who were mistakenly treate as inexperienced miners and laid off, the operator urges that they have no claim at all under the Act. I disagree. Although unlike the other complainants herein, they did no in fact require new miner training, the operator laid them off based solely on the mistaken belief that they did. Therefore, I conclude that the operator discriminated against them on the basis of their perceived lack of federally mandated training and I find that likewise impermissible and a violation of section 105(c) of the Act. Th fact that the operator was mistaken did not change the

2/ The collective bargaining agreement defines the term

equences suffered by the three miners. As the Commis-
has stated in an earlier discrimination case "[a]n
lly important consideration is that an affected miner
fers as much by mistake as he would if he were discrimi-
d against because he had actually engaged in protected
vity. We conclude that discrimination based upon a
icion or belief that a miner has engaged in protected
vity, even though, in fact, he has not, is proscribed
ection 105(c)(1)". Moses v. Whitley Development Corp.,
SHRC 1475, 1480 (1982).

Having considered the arguments of all the parties
in on the stipulated facts, I conclude that an order
ld be entered in favor of all the complainants granting
relief they seek.

ORDER

It is ORDERED that the complaint of discrimination be
WED.

It is FURTHER ORDERED that the parties, by counsel,
unicate for the purpose of stipulating the amounts of
tary relief due each of the named complainants, as well
ttorney fees that may be awarded to counsel for Inter-
r and file such stipulation with me on or before
ber 20, 1986.

It is FURTHER ORDERED that if agreement cannot be
hed on monetary relief or attorney fees, the parties
fy me of the same on or before October 20, 1986.

Finally, I note that the Act provides that any viola-
of the discrimination section shall be subject to the
isions of section 108 and 110(a). Therefore, it is
HER ORDERED that on or before October 20, 1986, the
ondent pay a civil penalty of $1,000 for violating
ion 105(c) of the Act.

Roy J. Maurer
Administrative Law Judge

B. K. Taoras, Esq., 455 Race Track Road, Meadow Lands, PA 15347 (Certified Mail)

Mary Lu Jordan, Esq., United Mine Workers of America, 900 15th St., NW, Washington, DC 20005 (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. LAKE 85-102-M A.C. No. 47-02575-05501
v.	:	Pit No. 6 Mine
NELSON TRUCKING, Respondent	:	

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicit U.S. Department of Labor, Chicago, Illinois, for Petitioner;
Mr. Kenneth M. Nelson, Nelson Trucking Company Green Bay, Wisconsin, pro se.

Before: Judge Lasher

A hearing on the merits was held in Green Bay, Wisconsi on August 13, 1986. After consideration of the evidence sub mitted and both parties agreeing, a decision on the record w entered at the conclusion of the hearing. This bench decisi appears below as it appears in the official transcript aside from minor corrections.

This matter arose upon the filing of a petition for ass ment of penalty by a document entitled, "Proposal for a Pena by the Secretary of Labor (herein Secretary) on October 21, pursuant to Section 110(a) of the Federal Mine Safety and He Act of 1977, 30 U.S.C. § 820(a) (herein the Act). The Secre charges the Respondent with violating 30 C.F.R. § 56.9087 wh provides: "Heavy duty mobile equipment shall be provided wi audible warning devices. When the operator of such equipmen has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible ab the surrounding noise level or an observer to signal when it safe to back up."

For purposes of this proceeding, I accept the definitio of "audible" contained in the Random House College Dictionar (1980 Revised Edition) as being both a reasonable, common se and commonly accepted indication of meaning: "actually hear capable of being heard; loud enough to be heard." The conce of this definition will be incorporated into the regulation

gaging in the following condition or practice: "The 120 Hou
ternational front-end loader has a back-up alarm, but it can
heard above the surrounding noise. The loader was observed
ading a truck with no foot traffic."

The matter, after being duly noticed, came on for hearing
Green Bay, Wisconsin, on August 13, 1986. The Secretary wa
presented by counsel, and the Respondent was represented by
R. J. Bruno, a consultant who is not a lawyer. The Secret
esented Inspector Arnie Mattson as its only witness, and Re-
ondent called two witnesses, Charlie Stauber, a crusher oper
or who was present on the mine premises at the time and plac
e alleged infraction occurred, and Perry Pautz, the owner of
e pit.

Although not specifically raised by Respondent at the hea
preliminary matter should be dealt with which was raised by
spondent in a letter dated February 21, 1986, which was sign
nneth M. Nelson. This letter indicates that:

> "Previous to the start of operation last spring, we asked for and were given a complimentary inspection. At that time we were told everything was in order. Your inspector later penalized us for a back-up alarm that he claimed was not loud enough. We have corrected the problem areas and feel we should have been told if these items and such were a problem at the time of our complimentary inspection. That is why we requested it in the first place."

This letter raises the question which occasionally occurs
he safety law concerning whether or not the Secretary, or m
ecifically MSHA, should be estopped from citing a violation
condition which previously it had not cited during prior in-
ections. More precisely, does the legal effect of prior no
forcement equitably estop a government agency from subsequen
arging a mine operator with a violation for a condition whi
believes contravenes the mandatory health and safety stand
Secretary v. King Knob Coal Company, Inc., 3 FMSHRC 1417,
981), the Commission rejected the doctrine of equitable est
mine safety and health proceedings. It noted therein that
ited States Supreme Court has held that equitable estoppel
does not apply against the federal government. The Comm

fault" structure of the Act. The Commission reached the sult in Secretary v. Burgess Mining and Construction tion, 3 FMSHRC 296. Therefore, to the extent that the of Respondent in the file raises the question of equitable l on the basis of the Secretary's failure to find and cite ons during the prior courtesy inspection or that the ry should be bound since it did not uncover such a situ- uring the courtesy inspection, such argument is rejected.

rning now to the issue which is more directly involved proceeding, that is whether or not a violation of the regulation occurred, determination of this issue rests e resolution of a conflict in testimony between the In- and Mr. Charlie Stauber, a crusher operator, who testified lf of the Respondent.

e Inspector indicated that the back-up alarm, which was ic and which was triggered when the front-end loader in n was put in reverse gear, could not be heard by a miner r person who would be behind the loader and who would sed to the hazard of being run over by the loader. The or indicated that the loader's operator, who sat in a the loader which had a rear-view window, would have his obstructed by the presence of the loader's engine and that rator's vision would be obstructed for varying distances, ng on the exact direction the operator would be directing ion toward.

direct conflict with the Inspector's determination as to ibility of the automatic back-up alarm was created by uber's testimony to the effect that on July the 10th, e was operating a crusher in the vicinity of the loader t he could hear the automatic back-up alarm clearly even e was wearing ear plugs. Before resolving the conflict testimony, I first note that the testimony of Mr. Pautz deemed sufficiently specific or otherwise probative to idered in the credibility resolution which follows.

concluding that the testimony of Mr. Stauber must pre- er that of the Inspector in this particular instance, it oe avoided that in a determination which essence is that oility and where it appears that one person's hearing is d and the other's is not that a basic overpowering factor the equation on the side and in support of the opinion of

pector in effect says it is not loud enough to be heard ov
surrounding noise. The crusher operator says that he cou
r it even with ear plugs on. The Secretary's burden of pr
not aided in this case by instruments or by the testimony
orroborating witness. In this instance the Secretary is f
have not established that a violation occurred by a prepon
e of the evidence.

Accordingly, it is ordered that Citation Number 2374053
ated.

Michael A. Lasher, Jr.
Administrative Law Judge

tribution:

uel J. Carmona, Esq., Office of the Solicitor, U.S. Depart
Labor, 230 South Dearborn Street, 8th Floor, Chicago, Illi
04 (Certified Mail)

Kenneth M. Nelson, Nelson Trucking Company, 2898 Flintvil
en Bay, Wisconsin 54303 (Certified Mail)

Complainant	:	
	:	Docket No. WEST 86-3-D
v.	:	
	:	DENV CD 85-22
ER RESOURCES, INC.,	:	
Respondent	:	

DECISION AND ORDER OF DISMISSAL

ore: Judge Lasher

Complainant has failed to respond to my Prehearing Order ued January 14, 1986. Thereafter, Complainant has failed respond to my Order to Show Cause dated July 21, 1986, and erwise proceed with his complaint herein. Complainant is s found to have abandoned the prosecution of this proceedir this matter should be, and hereby is, DISMISSED.

Michael A. Lasher, Jr.
Administrative Law Judge

tribution:

id L. Grindstaff, Esq., Quintana & Grindstaff, 375 South East, Salt Lake City, Utah 84108 (Certified Mail)

Thomas P. Martinez, P.O. Box 423, Price, Utah 84501
rtified Mail)

Michael Keller, Esq., VanCott, Bagley, Cornwall & McCarthy, South Main Street, P.O. Box 45340, Salt Lake City, Utah 84
rtified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 85-141-M A.C. No. 42-00377-05502
v.	:	Fife Brigham Pit
FIFE ROCK PRODUCTS COMPANY, INC., Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicit
U.S. Department of Labor, Denver, Colorado,
for Petitioner.

Before: Judge Morris

This is a civil penalty proceeding initiated by petition against respondent in accordance with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil pe sought here is for the violation of 30 C.F.R. § 56.15-7, a ma datory standard promulgated pursuant to the Act.

After notice to the parties, a hearing was scheduled in Salt Lake City, Utah on August 12, 1986. The petitioner appe but respondent failed to appear.

Pursuant to Commission Rule 63(b), 29 C.F.R. § 2700.63(b respondent was found to be in default.

Accordingly, I enter the following:

ORDER

Citation 2360673 and the proposed civil penalty of $600 affirmed.

John J. Morris
Administrative Law Judge

ribution:

aret A. Miller, Esq., Office of the Solicitor, U.S. Department
abor, 1585 Federal Building, 1961 Stout Street, Denver, Colo-
80294 (Certified Mail)

Clifford P. Woodland, General Manager, Fife Rock Products
any, Inc., P.O. Box 479, Brigham City, Utah 84302 (Certified
)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 86-26 A.C. No. 48-00977-035
v.	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solici U.S. Department of Labor, Denver, Colorado, for Petitioner;
Thomas F. Linn, Esq., Denver, Colorado, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by petit against respondent in accordance with the Federal Mine Saf and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil ties sought here are for the violation of mandatory standa promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits menced in Gillette, Wyoming on August 6, 1986. After conf the parties announced that they had reached an amicable se ment.

The citations, the standards allegedly violated, the assessments and the proposed dispositions are as follows:

Citation No.	Standard CFR Title 30	Assessment	Disposition
2222770	§ 77.20(b)	$119	$109
2222771	§ 77.1104	168	168

The proposed settlement further included striking the designation for Citation 2222770.

Discussion

have reviewed the proposed settlement and I find that easonable and in the public interest.

ecordingly, I enter the following:

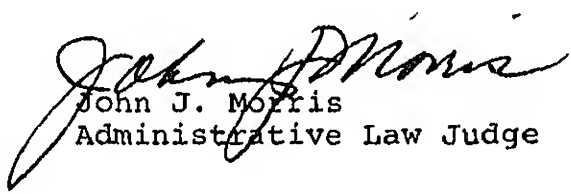
ORDER

The settlement is approved.

Citation 2222770 is affirmed as a non-S & S violation penalty of $109 is assessed.

Citation 2222771 and the proposed penalty of $168 are ed.

Respondent is ordered to pay to petitioner the sum within 40 days of the date of this Decision.



John J. Morris
Administrative Law Judge

bution:

I. Barkley, Esq., Office of the Solicitor, U.S. Department or, 1585 Federal Building, 1961 Stout Street, Denver, lo 80294 (Certified Mail)

F. Linn, Esq., 555 Seventeenth Street, Denver, Colorado (Certified Mail)

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 86-34 A.C. No. 48-00977-0350
v.	:	Black Thunder Mine
THUNDER BASIN COAL COMPANY, Respondent	:	

DECISION

Appearances: James H. Barkley, Esq., Office of the Solicit U.S. Department of Labor, Denver, Colorado, for Petitioner;
Thomas F. Linn, Esq., Denver, Colorado, for Respondent.

Before: Judge Morris

This is a civil penalty proceeding initiated by petiti against respondent in accordance with the Federal Mine Safe and Health Act of 1977, 30 U.S.C. § 801 et seq. The civil ties sought here are for the violation of mandatory standar promulgated pursuant to the Act.

After notice to the parties, a hearing on the merits c menced in Gillette, Wyoming on August 6, 1986. After confe the parties announced that they had reached an amicable set ment.

The citations, the standards allegedly violated, the o assessments and the proposed dispositions are as follows:

Citation No.	Standard CFR Title 30	Assessment	Disposition
2222714	§ 77.410	$85	$20
2222718	§ 77.1003	119	119

The proposed settlement further included striking the designation for Citation 2222714 and amending Citation 2222 to allege a violation of 30 C.F.R. § 77.1001 in lieu of its present designation.

I have reviewed the proposed settlement and I find that it is reasonable and in the public interest.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.

2. Citation 2222714 is affirmed as a non-S & S violation and a penalty of $20 is assessed.

3. Citation 2222718 for the violation of 30 C.F.R. § 77 is affirmed and a penalty of $119 is assessed.

4. Respondent is ordered to pay the sum of $139 to the petitioner within 40 days of the date of this Decision.

John J. Morris
Administrative Law Judge

Distribution:

James H. Barkley, Esq., Office of the Solicitor, U.S. Departm of Labor, 1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294 (Certified Mail)

Thomas F. Linn, Esq., 555 Seventeenth Street, Denver, Colorad 80202 (Certified Mail)

EMERY MINING CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 86-106-R
v.	:	Order No. 2833668; 3/11/
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Little Dove Mine

DECISION

Appearances: Timothy M. Biddle, Esq. and Susan E. Chetlin, Crowell & Moring, Washington, D.C., for Contestant; Edward J. Fitch, IV, Esq., Office of the Soli U.S. Department of Labor, Arlington, Virginia for Respondent.

Before: Judge Morris

This is a contest proceeding initiated by contestant p to § 105(d) of the Federal Mine Safety and Health Act of 19 30 U.S.C. § 801 et seq., (the Act).

Emery contested MSHA Order No. 2833668 for a failure t Citation No. 2833666 issued March 10, 1986.

A hearing on the merits of this case and related cases menced in Denver, Colorado on July 29, 1986.

At the hearing the parties advised the judge that the intended to vacate his order. In due course the order was and the contestant has, accordingly, moved to withdraw the of contest.

Pursuant to Commission Rule 11, 29 C.F.R. § 2700.11, c testant's motion is granted and the contest filed by Emery Corporation is dismissed.

ring, 1100 Connecticut Avenue, N.W., Washington, D.C. 20030
ertified Mail)

ward J. Fitch, IV, Esq., Office of the Solicitor, U.S. Depart
nt of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203
ertified Mail)

t

ADMINISTRATION (MSHA),	:	Docket No. KENT 95-112
Petitioner	:	A.C. No. 15-10198-03506
	:	
v.	:	Brenda Faye Coal Tipple Min
	:	
BRENDA FAYE COAL SALES CO., INC.,	:	
Respondent	:	

DECISION

Appearances: Charles Merz, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;
Daniel E. Karst, Esq., Brenda Faye Coal Sales Company, Inc., Closplint, KY, for Respondent

Before: Judge Fauver

The Secretary seeks a civil penalty for an alleged violation of a mandatory safety standard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

The charge was issued in connection with the investigatic of an accident. Joseph Shuler, a contract coal hauler, was permanently disabled when a Michigan front-end loader operated by Respondent's employee struck Shuler and mashed his leg against the front of his coal truck.

Shuler's leg was amputated as a result of severe, multiple fractures and lacerations of his leg. The front-end loader had defective brakes at the time of the accident.

A hearing was held in Lexington, Kentucky. Having considered the testimony, arguments, and the record as a whole, I find that the preponderance of the reliable, probativ and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent operates a coal tipple in Harlan County, Kentucky, which is part of a business enterprise of corporat controlled by Edward Karst. The enterprise is a medium size business, producing 300,000 tons of coal annually. It was stipulated at the hearing that a penalty within the limits of the Act would not affect Respondent's ability to continue in business.

2. On January 11, 1985, a coal hauling truck with an attached tandem trailer was loaded with coal at the tipple, and ready to leave. Its exit was a 10-12% grade, dirt road. Because of slippery conditions, the truck was unable to climb the grade.

3. David Karst, an employee at the tipple, and son of Edward Karst, drove a Michigan 275B front-end loader toward the site where the truck was stuck. He intended to descend the road, stop near the front of the coal truck, have a tow chain attached and tow the truck up the exit road.

4. When Karst descended the road toward the truck, he saw the truck driver in front of the truck. The driver was there to hook up the tow chain. Karst tried to stop the front-end loader to avoid hitting the driver and the coal truck, but he was unable to stop the front-end loader becaus of defective brakes. The brakes were only 35-40% effective. The bucket of the front-end loader struck the driver and the coal truck. The driver's left leg was crushed against the truck. Multiple fractures and lacerations of the leg resulte in amputation of the leg at the hospital. The coal truck's front-end was severely damaged by the collision.

5. Extensive repairs of the brakes of the front-end loader were required to bring the braking capacity up to a normal, safe operating condition. The extent of the brake deterioration and the type of repairs needed to correct it showed that the brake defects had not suddenly occurred but were detectable for a considerable period before and up to the time of the accident.

brakes before he started downhill toward the coal truck. At the top of the incline, he saw the driver in peril, in front of the coal truck, and had sufficient time and distance if the brakes were normal to stop the front-end loader without hitting the driver or the coal truck. However, because the brakes were defective his vehicle collided with the driver and the truck.

DISCUSSION WITH FURTHER FINDINGS

I find that Respondent was grossly negligent in operating the Michigan front-end loader with defective brakes. The loader is a very large vehicle, with wheels over eight feet high. Moving the vehicle around other equipment and personnel with only 35-40% effective brakes was a highly hazardous practice. The federal inspector issued an imminent danger order on the front-end loader, forbidding its use until the brakes were repaired. Respondent should have taken the vehicle out of service for proper brake repairs before January 11, 1985, the day of the accident. The gravity of the violation was very high, and, with normal brakes, and by exercising reasonable care, the front-end loader driver could have avoided the accident. He could have stopped his vehicle and told Shuler to get out of the way before proceeding down-hill toward the coal truck. The defective brake condition was a direct cause of the accident and permanent disabling injury of Joseph Shuler on January 11, 1985.

Respondent argues that Joseph Shuler should not have been standing in front of his coal truck and that his negligen contributed to the accident. However, with safe brakes, Karst would have been able to stop his vehicle and tell Shuler to stand aside before he proceeded down-hill. In addition, with safe brakes and by exercising reasonable care, Karst would not have struck the coal truck, which was substantially damaged by the collision. His collision with the coal truck was in no way caused by Shuler's presence in front of the truck.

brakes and reasonably prudent performance by the front-end loader driver, the front-end loader would not have struck Shuler and the coal truck.

Considering all of the criteria in section 110(i) for assessing a penalty, a civil penalty of $2,000 is deemed appropriate for this violation.

CONCLUSIONS OF LAW

1. The Judge has jurisdiction over the subject matter of this proceeding.

2. Respondent violated the safety standard as charged in Citation No. 2476582.

3. Respondent is ASSESSED a civil penalty of $2,000 f the above violation.

ORDER

Respondent shall pay the above assessed civil penalty of $2,000 within 30 days from the date of this Decision.

William Fauver
Administrative Law Judge

Distribution:

Charles F. Merz, Esq., Office of the Solicitor, U.S. Depart of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Edward W. Karst, President, Brenda Faye Coal Sales Comp Inc., Box 493, Louellen, KY 40853 (Certified Mail)

kg

SEP 19 1986

JOHN HATTER, JR., Complainant	:	DISCRMINATION PROCEEDING
v.	:	Docket No. PENN 85-290-D
	:	MSHA Case No. WILK CD 85-1
FRANKLIN COAL COMPANY, Respondent	:	Franklin Breaker Mine

DECISION

Appearances: Cyrus Palmer Dolbin, Esq., Pottsville, Pennsylvania, for the Complainant; Franklin I. Miller, President, Franklin Coal Company, Pinegrove, Pennsylvania, pro se.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The complainant alleges that he was discharged by the respondent because he filed a clai for black lung benefits, and the respondent maintains that the complainant was laid off for certain economic reasons. The initial complaint was filed with the Secretary of Labor Mine Safety and Health Administration (MSHA), and following an investigation of the complaint, MSHA advised the complai ant that its investigation failed to disclose any violation of section 105(c). The complainant then filed his complain with this Commission.

A hearing was held in this matter in Pottsvil'e, Pennsylvania, and the parties appeared and participated ful in the hearing. The parties waived the filing of any post-hearing arguments, but I have considered the oral arguments made on the record during the hearing in the course of this decision.

of certain economic conditions or financial losses as claim by the respondent.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Min Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Discussion

Complainant's Testimony and Evidence

John Hatter, Jr., testified that he is presently worki for the Sherman Coal Company, and that he previously worked for the respondent from April 10, 1970, to January 30, 1985 His duties included the loading of trucks, taking care of t fine coal plant, and loading trailers with a front-end load

Mr. Hatter stated that he filed for black lung benefit on November 28, 1984. On January 30, 1985, Company Preside Franklin Miller summoned him to his office and advised him that he had to be laid off "because he said coal sales were down and he was being audited" (Tr. 12). Mr. Hatter stated that he asked Mr. Miller why he couldn't lay someone else off, and Mr. Miller said "they could weld and I couldn't" (Tr. 12). Mr. Hatter confirmed that he left work that same day.

Mr. Hatter stated that during his employment with the respondent he had no disputes over his work, was always on time, had no arguments with management, and he considered himself to be a good employee (Tr. 13). He stated that Mr. Miller never complained about his work (Tr. 24). He identified employee Robert Hoffman as the only person with more seniority, and he identified five other employees who had less seniority with the company (Tr. 16-17). Mr. Hatte stated that after he was laid off, Mr. Hoffman was injured the job and was in the hospital. The respondent hired no o to fill his vacancy, and Mr. Hoffman has since returned to

further calls or communications from Mr. Miller to go back to work (Tr. 19). He confirmed that he was receiving unemployment benefits from the State of Pennsylvania, and that in order to receive those benefits he had to be ready, willing, and able to work (Tr. 20). He also confirmed that he could have done welding work (Tr. 20).

Mr. Hatter's counsel produced copies of payroll slips from July 6 to December 28, 1984, reflecting that Mr. Hatter earned an average of $221.69 a week while employed with the respondent during this time period (Tr. 21, exhibit C-2). Mr. Hatter confirmed that he was unemployed from January 30, 1985 to September 14, 1985, the date that he went to work for the Sherman Coal Company, and that his unemployment benefits stopped in July, 1985 (Tr. 23). He stated that he received unemployment benefits from January 30 through July, 1985, and that they amounted to $122 a week (Tr. 24).

Mr. Hatter's counsel produced a copy of a letter dated February 25, 1985, after Mr. Hatter's termination, from Mr. Miller to the Office of Coal Mine Workers' Compensation Programs, Wilkes-Barre, Pennsylvania, stating that Mr. Hatter was never absent from work due to illness and never complaine that he was short of breath or wanted other work because of shortness of breath (exhibit C-3, Tr. 24-25). The letter als states: "Before we are liable and John Hatter is found eligible that he received Black Lung benefits, I want proof that h does have pneumoconiosis by a second opinion from doctors' examinations, x-rays, etc."

In response to further questions, Mr. Hatter confirmed that he did not inform Miller that he was going to file his black lung claim before he filed it and that he never discussed it with him (Tr. 26). Mr. Hatter stated that he filed the claim because "I was getting up in age. It takes 6 or 7 years to get it" (Tr. 26). He filed it to establish his eligibility and to protect whatever rights he had under any applicable law. Mr. Hatter also confirmed that he never contacted anyone from MSHA regarding his claim (Tr. 27).

Mr. Hatter stated that Mr. Miller employs seven people, and he described Mr. Miller's operation as a preparation plant which processes and cleans coal received from different sources. The coal is resold to different truckers and jobbers, and at one time it was shipped by rail. There is no

mined there. Mr. Hatter could not state the volume of coal processed by the plant (Tr. 28-29).

Mr. Hatter confirmed that Mr. Miller's operation is non-union, and that when he was terminated, Mr. Miller told him that his coal sales were down and they did not discuss his black lung claim. Mr. Hatter reiterated that at no time prior to his termination did he ever discuss any black lung condition or claim with Mr. Miller, and he conceded that Mr. Miller had no reason to know about it, and never said anything to Mr. Hatter which would lead him to believe that he knew about the claim (Tr. 42-46). When asked why he believes he was terminated by Mr. Miller because he filed for black lung, Mr. Hatter responded "Well, it seems to figure. He got notice the 29th, and the 30th I got laid off" (Tr. 46).

Mr. Hatter's counsel confirmed that Mr. Hatter is waiting for a hearing date on his black lung claim, and that it usually takes 5 to 7 years for a hearing to determine his eligibility for benefits (Tr. 29). Counsel conceded that the black lung claim is different from any Part 90 Miner status under MSHA's regulations, and he stated that he was not familiar with those regulations and has not read them thoroughly (Tr. 30). He conceded that Mr. Hatter has never filed for Part 90 status under MSHA's regulations, and Mr. Hatter himself confirmed that he never filed for such status (Tr. 31-32, 38).

Mr. Hatter stated that he sought treatment or medical advice for his alleged black lung condition on one occasion, and his counsel confirmed that this was done in connection with the filing of his black lung eligibility claim, and that this was done after his termination by the respondent (Tr. 33). Copies of certain medical records introduced by Mr. Hatter's counsel include a chest radiographic diagnosis of "Pneumoconiosis with probable emphysema." Mr. Hatter's counsel conceded that prior to his termination by the respondent, he was not examined for black lung nor was that fact made known to Mr. Miller prior to the filing of his claim, but that it was made known immediately after the filing of the claim (Tr. 35).

Mr. Hatter's counsel pointed out that Mr. Hatter worked in a "watered down work area," and since he was in a dust-free

dent, and may have contracted black lung then (Tr. 39).

Mr. Hatter's counsel submitted that on January 29, 19 the day before he was laid off, Mr. Hatter received notice from the U.S. Department of Labor that his black lung clai had been filed, and that the respondent also received a co of that notice, (exhibit C-1, Tr. 14). Counsel asserted t this was the first notice that the respondent would have received of the filing of Mr. Hatter's claim, and that it probably received by January 29-30, 1985, the date on whic he was dismissed (Tr. 15).

Respondent's Testimony and Evidence

Franklin I. Miller, confirmed that he is the owner an operator of the Franklin Coal Company. He described his o ation as a coal preparation plant, and he stated that he p chases coal from different suppliers and sells it to broke or other domestic users. The average number of employees four to five, and the number of days the plant is in opera tion varies. At the present time, the plant operates less than 5 days a week, and on some weeks it only operates for 2 days depending on the amount of coal processed. For the year 1985, the plant processed 10,884 tons of coal, and handled an additional 40 percent which is simply bought an resold without processing (Tr. 50-53).

Mr. Miller stated that his coal tonnages and sales fo the past 10 years have diminished roughly 20 percent a yea and that at the time he laid off Mr. Hatter he had to empl less people because his sales did not warrant the number o people he employed. The December 1984 audit from his acco tant reflected a loss of $31,419.39 for that month (Exhibi R-2, Tr. 54). A statement of profit and losses for the entire year of 1984 reflect a net loss of $70,563.88 (exhi R-1, Tr. 54).

Mr. Miller stated that at the time he terminated Mr. Hatter he was still waiting for his final 1984 yearly audit of his financial position as reflected in exhibit R- but he knew that his financial position was such as to require some changes in his structure and operation. In a decision to lay off employees, he considers which employee are more important to his operation. In this case, Robert Hoffman was a welder and a supervisory foreman, and everyo

he had working in the office (Tr. 55).

On cross-examination, Mr. Miller stated that during past business slumps he did not lay off employees. Although he did not actually receive his final 1984 audit until after Mr. Hatter was terminated, he did receive monthly reports and "had an inkling" that he was operating at a loss. He stated that he explained this to Mr. Hatter when he laid him off (Tr. 57).

Mr. Miller confirmed that he received the notice dated January 28, 1985, concerning Mr. Hatter's black lung claim in the mail, and conceded that he may have received it on the 29th or 30th, but was not sure as to the exact date he received it (Tr. 57-59). He also stated that "I might have gotten this before, yes" (Tr. 59). He explained that he laid Mr. Hatter off on January 30, because it was the end of a weekly pay period, and the day following began a new pay period (Tr. 59). Although January 30 was a Wednesday, Thursday was the end of the pay period, and Mr. Hatter would have picked up his check on Friday, and it was decided to terminate him at the end of the week so as not to establish a new account for him (Tr. 60-61).

Mr. Miller stated that at the present time he has only three employees, including himself, on his payroll. He denie that Mr. Claire Zimmerman, his brother-in-law, is on his payroll, and he explained that he sold a car to Mr. Zimmerman an that he helped out to pay for the car. Mr. Miller also state that he operates another business installing satellite dishes and that Mr. Zimmerman helps load them on the trucks to pay off the car, and that he is available as needed. Mr. Miller confirmed that Mr. Zimmerman at one time worked for his (Miller's) father as a loader, welder, and plant operator, an that he is married to his sister, who works as his part-time secretary (Tr. 64).

Mr. Miller stated that subsequent to Mr. Hatter's termin ation, Mr. Hatter's son was on his payroll, but was laid off in May, 1985. He also laid off employee Edward Wolfe at the same time he laid off Mr. Hatter, but did not advise Mr. Hatter of this fact because their discussion was very brief (Tr. 66). Although Mr. Hatter first came to work in 1970 when his (Miller's) father owned the business, Mr. Mille stated he took over the business from his father in 1975 (Tr.

no formal seniority program, and since he is the boss "I pick and choose" (Tr. 68).

Mr. Miller stated that he has never discussed Mr. Hatter's discrimination complaint with him. He confirmed that his company provided Mr. Hatter with hospitalization benefits and that Mr. Hatter has received $11,000 to $12,000 as the beneficiary of a company retirement plan funded totally by the company (Tr. 69-70). When asked why he believed Mr. Hatter filed the complaint against him, Mr. Miller responded "to get out of the boss what you're going to get out of him" (Tr. 69).

Mr. Miller disagreed with Mr. Hatter's assessment of himself as an employee. Mr. Miller stated that his lay-off decision concerning Mr. Hatter did not come about "on the spur of the moment." He stated that for the past 5 years he has been dissatisfied with Mr. Hatter's work, and he gave several examples of what he considered to be poor performance, including complaints from customers and instances when Mr. Hatter put in for time worked when he actually did not work. On those occasions, Mr. Miller would deduct the time from Mr. Hatter's pay, without objection (Tr. 70-72).

Mr. Miller asserted that he probably should have fired Mr. Hatter earlier, but instead laid him off so that he could collect his unemployment for 26 weeks (Tr. 72). Mr. Miller conceded that he did not tell Mr. Hatter this, nor did he discuss his work with him at the time he laid him off, and he denied that Mr. Hatter was fired (Tr. 72). He further explained that he did not bring these matters up with Mr. Hatter when he laid him off because he did not wish to be subjected to any abuse from Mr. Hatter (Tr. 74). Mr. Miller also indicated that he was reluctant to bring up Mr. Hatter's work performance "for his sake" (Tr. 74). When asked why he did not fire Mr. Hatter earlier, Mr. Miller responded "Did you ever hear the expression that they say: Give a guy enough rope, he'll hang himself? Well, that's exactly what he did" (Tr. 75). Mr. Miller explained further at (Tr. 102):

> JUDGE KOUTRAS: Well, you keep talking about the rope now. But, why didn't you put on the rope 4 years or 3 years? Why did you wait until this?

cial situation is what decided this. His black lung, I have no control over whether he gets black lung or he doesn't have any black lung. That's not my decision to make; that's the doctor's decision. We paid into the funds for him to get black lung, if he has it.

When asked why he did not bring up Mr. Hatter's poor work performance when he was contacted by an MSHA investig tor during the investigation of his discrimination complai Mr. Miller responded " I didn't want to bring that up for own benefit, and, I didn't want to bring it up here today. don't like to treat men like that" (Tr. 103-104). In response to further questions, Mr. Miller stated as follow (Tr. 104-105):

JUDGE KOUTRAS: Why did you feel compelled to bring it up today?

MR. MILLER: Because you were asking me about my brother-in-law and about the car that he worked for. And, well, naturally I'd bring everything out. I mean, I don't like -- I'm not an individual who would go down there and rub mud in anybody's face, because I don't expect that of myself either.

JUDGE KOUTRAS: When he received unemployment compensation benefits what did you tell the state people your reason for terminating him; do you recall?

MR. MILLER: I laid him off because I needed welders and I had to cut down on the payroll. I had to make up some seven thousand dollars there some place. That's the first place. Besides taxes and -- you see, when you have five people on the payroll -- four instead of five, you're paying twenty percent less into Black Lung funds, twenty percent less hospitalization.

I had to get rid of men because of costs. I was the boss of the place. I worked out there like everybody else. So, I was in a

do the work myself. That's only surviving.

JUDGE KOUTRAS: Do you pay your portion or share of Black Lung to this insurance carrier for all your employees?

MR. MILLER: Yes.

JUDGE KOUTRAS: Across the board?

MR. MILLER: Everyone, yes.

Mr. Miller confirmed that while he was familiar with MSHA, he was not familar with the black lung program because he was never involved with it. He denied any knowledge of MSHA's "Part 90" program, and he stated that none of his employees have ever made application for that program, nor has MSHA ever advised him that any employee had to be reassigned to get them out of dusty environments. He stated that he has always been in compliance with MSHA's dust standards (Tr. 76).

Mr. Miller stated that he never discussed Mr. Hatter's black lung claim with him, and that he first learned about i through the notice letter of January 28. Mr. Miller stated that he had no basic familiarity with the claim and was not concerned that it might cost him money or cause problems (Tr 77). He insisted that he laid Mr. Hatter off because of economic conditions, and that he has been patient with him for the past 5 years. He confirmed that Mr. Hatter's attendance record was good and that he was "always there on time" (Tr. 78). He also confirmed that he did not document Mr. Hatter's past poor work performance.

Mr. Miller stated that he has no control over Mr. Hatter's asserted black lung condition, and that he has paid into the Federal and state black lung fund for as long as he has been in business. He explained that the funds are paid into an insurance fund, and that the insurance company pays for black lung benefits and that he is not personally liable for any claim. If he were, it would be impossible fo him to stay in business (Tr. 102-103).

Mr. Hatter was called in rebuttal, and denied that he ever threatened a strike or slowdown if he did not get a raise. He stated that he got along well with Mr. Miller, a

he never discussed the matter with Mr. Zimmerman. Mr. Hatter confirmed that he received company paid hospitalization and retirement benefits, and that he never had any trouble or problems with Mr. Miller (Tr. 80-84). He confirmed that Mr. Miller did not discuss company finances with him at the time he was laid off, and that Mr. Miller simply told him that coal sales were down and he was being audited (Tr. 84).

Mr. Hatter stated that he filed his discrimination complaint with MSHA after a contact by someone from MSHA's Wilkes-Barre office. Someone from MSHA called him at home, and one of its representatives came to his house and took his complaint statement of May 12, 1985. Mr. Hatter's wife, who was present in the hearing room, confirmed that someone from MSHA contacted Mr. Hatter as a result of his black lung claim and when that individual inquired as to whether Mr. Hatter was still employed, Mr. Hatter advised that he was laid off the day following the receipt of the notice of his black lung claim and that the MSHA person stated "no way" (Tr. 90). Some one from MSHA subsequently came to their home and had Mr. Hatter fill out the complaint papers (Tr. 91).

Mr. Miller stated that he was contacted by an MSHA representative during the investigation of Mr. Hatter's complaint. Mr. Miller stated that he informed the representative that he had also laid off Mr. Wolfe at the same time, and that the representative spoke with Mr. Wolfe. Mr. Miller was later notified that MSHA found no discrimination in this case (Tr. 92).

Mr. Hatter denied that Mr. Miller ever told him that he would take him back if economic conditions got better, and Mr. Hatter did not ask him about this. Mr. Hatter believed that Mr. Miller should have laid someone else off with less seniority (Tr. 96).

Findings and Conclusions

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Company, 2 FMSHRC 2768, (1980), rev'd on other grounds

(1984). The operator may rebut the prima facie case by
ing either that no protected activity occurred or that
adverse action was in no way motivated by protected act
If an operator cannot rebut the prima facie case in thi
matter it may nevertheless affirmatively defend by prov
that (1) it was also motivated by the miner's unprotect
activities alone. The operator bears the burden of pro
regard to the affirmative defense. Haro v. Magma Coppe
Company, 4 FMSHRC 1935 (1982). The ultimate burden of
sion does not shift from the Complainant. Robinette, s
See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983);
Donovan v. Stafford Construction Company, No. 83-1566,
Cir. (April 20, 1984) (specifically-approving the Commi
Pasula-Robinette test). See also NLRB v. Transportatio
Management Corporation, _____ U.S. ___, 76 L.Ed.2d 667

Section 105(c)(1) of the Mine Act provides in pert
part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act * * * because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 * * *. (Emphasis added.)

Section 101(a)(7), of the Mine Act provides in per
part as follows:

> * * * [W]here appropriate, any such mandatory standards shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may

result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification.

The mandatory health standards authorized by section (a)(7) of the Mine Act, are found at 30 C.F.R. Part 90. suant to those regulations a miner employed at an under- und coal mine or at a surface area of an underground coal e may be eligible to work in a low dust area of the mine re there has been a determination that he has evidence of umoconiosis. If there is evidence of pneumoconiosis, a er may exercise his option to work in a mine area where dust levels are below 1.0 milligrams per cubic meter of .

In Gary Goff v. Youghiogheny & Ohio Coal Company, MSHRC 1776 (Nov. 1985), the Commission held that a miner state a cause of action under section 105(c)(1) of the by alleging discrimination based on the miner's being e subject of medical evaluations and potential transfer" er 30 C.F.R. Part 90. In this case, Mr. Hatter makes no h claim. He simply alleges that he was terminated one day er the respondent was advised that he had filed a claim black lung benefits. Thus, the issue presented is ther Mr. Hatter's termination was in any way prompted by filing of this claim.

The record in this case establishes that Mr. Hatter filed black lung eligibility claim on November 28, 1984, and t Mr. Miller had no knowledge of that filing. Mr. Hatter cedes that at no time prior to the filing of his claim, did discuss his claim or any asserted black lung condition with Miller, and there is no evidence that Mr. Miller knew ut it. Further, there is no evidence in this case that Miller knew about Mr. Hatter's claim until the Department Labor's Notice of Claim dated January 28, 1985. Mr. Hatter erted that he received the notice on January 29, 1985, and assumed that Mr. Miller also received it in that day (Tr. . Mr. Hatter further conceded that he and Mr. Miller have

C-3, which Mr. Miller sent to the Labor Department examiner after Mr. Hatter was terminated. Since the claim examiner is the same individual who signed the January 28, 1985, Notice of Claim sent to Mr. Miller, I assume that Mr. Miller's letter of February 25, 1985, was in response to that notice.

Mr. Hatter conceded that on the day of his termination, Mr. Miller said nothing which would lead him to believe that Mr. Miller had any knowledge that he had filed a claim for black lung benefits. Mr. Hatter's counsel conceded that he cannot establish that on the day of the termination Mr. Mille had already received notice of the claim. Since Mr. Hatter received his notification on January 29, the day before his termination, Mr. Hatter assumed that Mr. Miller also received his copy that day, and that on the day of the termination, January 30, Mr. Miller had knowledge that he filed his claim. Mr. Hatter's counsel asserted that since Mr. Miller and Mr. Hatter lived within the same 5-mile radius, there is a presumption that Mr. Miller received notice of the claim on January 29, the same day that Mr. Hatter received his. Counsel candidly conceded that the basis for the discrimination claim is an inference that Mr. Miller believed there was some legal ramification flowing from Mr. Hatter's black lung claim, and that Mr. Miller terminated him for that reason (T 36).

I take note of the fact that Mr. Miller's response to the notification that Mr. Hatter had filed a black lung clai came almost a month later when he sent his response of February 25, 1985, to the Labor Department. It seems to me that had Mr. Miller been really concerned about his liabilit for any black lung benefits to Mr. Hatter, he would have responded earlier. Further, Mr. Miller explained that he ha always contributed to the black lung benefits fund for as long as he has been in business, that any benefits are paid by the appropriate insurance carrier, and that he is not personally liable for these payments. Given these circumstance I cannot conclude that at the time of the termination the respondent was in any way concerned or motivated by the fact that Mr. Hatter had filed a claim for black lung benefits.

On the facts of this case, it seems clear to me that Mr. Hatter has not established that he ever applied to MSHA for classification as a Part 90 Miner, and at no time prior to his termination was he ever "the subject of medical evalu

medical advice for his alleged black lung condition was
connection with his filing of a black lung eligibility
and this was done after his termination by the responde
Mr. Hatter filed his claim in order to preserve any fut
rights to black lung benefits and in recognition of the
that any administrative determination of his claim may
years to adjudicate. Mr. Hatter's counsel conceded tha
black lung claim is different from any Part 90 Miner st
under MSHA's regulations, and he questioned Mr. Hatter'
gibility under those regulations because his work with
respondent was in a watered down dust-free environment.
the circumstances presented in this case, I conclude ar
that Mr. Hatter has failed to establish a prima facie c
that he was terminated because he was "the subject of n
evaluation and potential transfer" under Part 90, or be
he had filed a claim for black lung benefits. Accordin
his complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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/fb

SEP 19 1986

ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-299 A.C. No. 36-06172-03501
v.	:	Blackhawk Mine
EANEY, SHIELDS, BRICK, PARTNERS, Respondent	:	

ORDER OF DEFAULT

efore: Judge Broderick

On August 25, 1986, I issued an order to Respondent to s ause on or before September 5, 1986 why it should not be hel efault for failure to comply with my prehearing order issue ay 12, 1986. At the request of Respondent made in a telepho onversation on September 5, 1986, I extended the time to res o the order to show cause to September 15, 1986. Responden ot responded to the order to show cause.

Therefore, I find that Respondent is in DEFAULT. IT IS RDERED that the penalties proposed in the Assessment Order ttached as Exhibit A to the Petition in the total amount of re imposed as the final order of the Commission. IT IS FUR RDERED that Respondent shall pay such penalties in the amou 82 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

Mr. Gary E. Yeaney, Partner, R.D. 2, Box 62A, Mayport, PA 1
(Certified Mail)

slk

SEP 19 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. PENN 85-305 A.C. No. 36-02405-0360
v.	:	
	:	Greenwich No. 1 Mine
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Respondent	:	
GREENWICH COLLIERIES, DIVISION OF PENNSYLVANIA MINES CORPORATION, Contestant	:	CONTEST PROCEEDING Docket No. PENN 84-90- Citation No. 2255016;
v.	:	
	:	Greenwich No. 1 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

DECISIONS

Appearances: Linda M. Henry, Esq., Office of the Soli
U.S. Department of Labor, Philadelphia,
Pennsylvania, for Petitioner/Respondent;
Joseph T. Kosek, Jr., Esq., Ebensburg,
Pennsylvania, for Respondent/Contestant.

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern a civil pen
proceeding initiated by MSHA against the respondent pur

MSHA inspector on March 16, 1984. The contest was filed by the contestant to challenge the legality of the citation.

The cases were consolidated for hearing, and the partie appeared and participated fully therein. Greenwich filed a posthearing brief, but MSHA did not. However, the oral argu ments presented at the hearing have been considered by me' ir the course of these decisions.

Issues

The issues presented are whether or not the condition c practice cited by the inspector constitutes a violation of the cited mandatory safety standard, and whether the alleged violation was "significant and substantial." Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-165, 30 U.S.C. § 801 et seq.

2. Commission Rules, 29 C.F.R. § 2700.1 et seq.

Stipulations

The parties agreed to incorporate by reference the foll ing agreed-upon stipulations from a consolidated proceeding (PENN 85-204 and PENN 85-114-R), heard the day prior to the hearing in the instant cases (Tr. 191):

> 1. The subject mine is owned and operated by the respondent/contestant Greenwich Collieries.
>
> 2. Greenwich Collieries and the subject mine are subject to the Act.
>
> 3. The presiding administrative law judge has jurisdiction to hear and decide these cases.

5. Payment of the assessed civil penalty will not adversely affect the respondent/contestant's ability to continue in business.

6. The respondent/contestant's annual coal production is approximately two million tons. Greenwich Collieries is a medium-to-large mine operator.

7. The respondent/contestant exhibited ordinary good faith in timely abating the cited condition or practice.

8. Respondent/contestant's history of prior paid civil penalty assessments consists of 245 paid assessments for the first 9 months of 1985, 214 in 1984, and 155 in 1983.

MSHA's Testimony and Evidence

MSHA Inspector William Sparvieri testified as to his background and experience, and he confirmed that he issued the section 104(a) citation in question on March 16, 1984 (exhibit G-1). He stated that he was dispatched to the mi to assist MSHA's ventilation technical support personnel w were conducting a ventilation survey at the mine. This su vey was being conducted because approximately a month earl the mine had experienced a methane explosion which resulte the death of three miners and injuries to several others. confirmed that he cited a violation of section 75.329, aft finding a 3.3 percent methane accumulation at bleeder eval tion point No. 14. He also confirmed that he collected on 50 cc vacuum bottle sample of the mine atmosphere at that tion, and he identified exhibit G-2, as the results of the laboratory analysis made of the sample by MSHA's Mt. Hope, West Virginia laboratory. The report reflected .24 carbon dioxide, 19.85 oxygen, 3.26 methane, and zero carbon monox (Tr. 4-9).

plan, and that the company was required to make an exar
tion at that location at least weekly on a 7-day cycle,
to record its findings in an approved book used for thi
pose. He observed dates and initials at the bleeder pc
question to substantiate the fact that the company had
examinations at that location (Tr. 12).

Mr. Sparvieri stated that his initial methane reac
3.3 percent was made at a location where a sign was pos
identifying it as Bleeder Evaluation Point 14. He proc
50 feet inby that location and detected methane in the
4.0 percent range with a hand-held methane detector.
decided not to go any further because he was unfamiliar
the mine ventilation as a whole, was aware of the prev
methane explosion, was unsure as to how the gob was be
ventilated, and was concerned that "questionable air ma
been present" if he went any further (Tr. 13). He cons
the methane reading which he took as extremely dangerou
issued a section 107(a) imminent danger order as well a
citation for an excess of 2 percent methane at the blee
evaluation point. The order was subsequently vacated a
made a part of a previously issued imminent danger ord
a section 103(k) order which restricted mine activity
of the prior methane explosion (exhibit G-3, Tr. 14).

Mr. Sparvieri confirmed that he could not determi
whether the operator was aware of the cited condition,
had no way of knowing how long the methane condition ha
existed. He was not sure whether a recent examination
area had been made by the operator because the mine had
closed by the previously issued orders. He took this
account when he rated the negligence as "low," but he
that the cited condition created an explosion hazard.
"possibility" or "potential" for an explosion was prese
he considered it reasonably likely that an explosion ha
was present since had he proceeded inby any further he
have encountered an explosive mixture of methane. Had
explosion occurred, the results would have been fatal,
16 miners would have been in danger. He estimated this
after observing miners working along the track haulage
other outby areas as he left the area to find a telepho

supplies along the track haulage (Tr. 17).

Mr. Sparvieri could not state whether or not the gob area in question had previously experienced any ventilation problems, but he was aware of the fact that an explosion had occurred and that the mine had a history of methane liberation in excess of 2 million cubic feet a day (Tr. 18).

On cross-examination, Mr. Sparvieri confirmed that at the time he issued the citation he was not a ventilation specialist, and that his duties did not normally entail the inspection of the No. 1 Mine. He stated that when he detected the methane in question, he tested the air movement in the vicinity of the bleeder evaluation point, but the air movement was so slight that it would not turn the blades on the anemometer. He then used a smoke tube and took approximately five or six readings over a 10-foot distance with chemical smoke and calculated an air reading of 1,311 cubic feet per minute as reflected on the Mt. Hope laboratory report. The smoke which he released during his test travelled outby in its proper direction (Tr. 19-20).

Mr. Sparvieri stated that during his MSHA training he has received instructions concerning MSHA's standard procedures for making tests in connection with regulatory section 75.329. He explained that once a determination is made as to location of the bleeder evaluation points as shown on the mine map, all air readings and methane examinations are made at these locations. When asked for his interpretation and application of section 75.329, Mr. Sparvieri responded as follows (Tr. 21-22):

> Q. I would like to show you the Code of Federal Regulations 75.329, and I would like you to read the area that I have underlined, beginning with "Air" down to "split."
>
> A. Underlined in black?
>
> Q. Yes, sir.
>
> A. Okay. "Air course through the underground areas from which pillars have been wholly or partially extracted and which enters another split of air shall not contain

volume of methane when tested at the point it enter such other split?

A. My interpretation of that is prior to it enters the other split, not after it enters the main return.

Q. But do you have any specific instructions as to prior to when it enters the other split, the distance involved?

A. Yes, sir.

Q. Could you tell us that?

A. Yes. For example, if the BE was down closer to where it enters that split, you would have to get inby the rib line of that entry, so that turbulence or swirling of air from the main return would not affect your reading in any way.

Mr. Sparvieri confirmed that he made his methane tes the bleeder location approximately 70 to 100 feet away fr the split where the air from the bleeder joined the air f the return split (Tr. 30-31). He explained the procedure followed for determining the air mixing point as follows 31-33):

Q. In your MSHA training, were you ever told what procedure to use to determine the mixing point?

A. What procedure to determine the mixing point?

Q. Yes, sir.

A. Yes.

Q. Would you tell us what that procedure is?

A. To use chemical smoke and to get inby the turbulence and inby the swirling air, so that

A. Yes, I used smoke in a twofold purpose. I used it primarily to determine direction of air flow and to maintain or to get an accurate air measurement of CFM. When the smoke was discharged, there was no effects of swirling or turbulence in that area. We were inby the main return far enough where there was no mixing.

Q. But isn't the procedure to go inby where the split is, release the smoke at that point, and follow the current and then go 1 foot inby that position and take your reading?

A. I am not familiar with that. My training is to evaluate gobs, abandoned areas, worked out and pillared areas either in their entirety, by walking the perimeter of these locations, or to examine these locations at specified points approved on the ventilation map in the form of IE's and BE's. Regardless if that IE or BE is 10 feet from the mixing point of 150 feet or 500 feet from the mixing point, MSHA instructions are to examine BE's at their approved location on the review map in effect at that mine, at that particular time, and that is what I did.

Q. That MSHA instruction, is that out of the Indiana field office?

A. I can't answer for all of MSHA, but as far as I know, that is everywhere.

Q. Where did you get your instruction on that specific point, was it from your field office?

A. It was from my field office, it was from the district in Pittsburgh, and whether that policy and that training was discussed in Beckley, I can't answer that.

the Hastings field office is?

A. I have no idea, sir.

Mr. Sparvieri stated that 2 percent methane is the l permitted inby the air mixing point, and that the explosi quantity of methane ranges from 5 to 15 percent (Tr. 36). With regard to the existence of any ignition sources in t cited area, he stated that a possible roof fall could set an explosive mixture of gas, but he could not state wheth any electrical equipment was present in the air return (T 37).

In response to further questions, Mr. Sparvieri conf that he contacted his supervisor James Biesinger prior to ing the citation because he was unfamiliar with the mine tilation, could not determine what areas of the mine coul possibly be effected by the methane, and had no idea as t what areas of the mine he should close (Tr. 37-38). Alth the mine had been closed by the prior orders, general min maintenance was taking place, and this included water pum timbering, and rock dusting. No coal production was taki place, and the work being performed was permitted by cert modifications which were made to the orders (Tr. 39-40).

Mr. Sparvieri stated that the roof conditions in the cited area were "fairly good," but that the inby gob area continuously had roof falls. Water pumps were in operati but he did not know how close they were to the cited area and he did not know how much methane would be forced into main return (Tr. 40). He confirmed that the prior methan explosion occurred when a spark from a water pump ignited accumulation of methane from a gob which was not adequate ventilated (Tr. 41).

Mr. Sparvieri stated that bleeder evaluation points the designated locations for an operator to make methane checks for the purpose of compliance with section 75.329. explained that an operator is required to travel and exam all mine areas on a weekly basis. However, in areas whic are inaccessible, hazardous, or have had pillar falls, an operator may apply to the MSHA district manager for desig bleeder or intake evaluation points in lieu of walking th areas. In the instant case, the bleeder evaluation point question was approved by the district manager, and the op

methane test be made at a point before the air enters the split. Assuming the test is made at a location 50 feet before the air enters a split, and that location is not a bleeder evaluation point, the test would not comply with section 75.329. He confirmed that this interpretation has been the way he has been instructed since he has been an inspector (Tr. 45).

John A. Kuzar, MSHA Ventilation Specialist and Hastings, Pennsylvania, Field Office Supervisor, confirmed that the No. 1 Mine is under his supervision. He stated that he participated in the recovery operations after the methane explosion and that he travelled all of the gobs and examined all of the bleeder evaluation points during February and March, 1984. He confirmed that prior to this time the mine was on a section 103(i) 5-day spot inspection cycle because of the amount of methane liberated in a 24-hour period. The mine had problems on numerous gobs, and 11 of the 30 gobs had problems concerning evaluations and direction of air flow (Tr. 62-64). He pointed out that ventilation was being established in some of these areas prior to reopening the mine, and some of the areas had high methane (Tr. 65).

Mr. Kuzar stated that he visited the mine a day after Mr. Sparvieri was there and issued a section 104(d) order on March 17, 1984 (exhibit G-4), because of a pressure drop in the air (Tr. 67). Mr. Kuzar agreed that in the instant case the theory of MSHA's case is that when Mr. Sparvieri found 3.3 percent methane, this indicated that the ventilation system for the cited area was not maintained (Tr. 68).

Mr. Kuzar explained the purpose of section 75.329 as follows (Tr. 71-76):

> A. The purpose of 329 is to insure that you have good positive pressure over a gob, that you are diluting and rendering harmless any noxious gases. You are shoving it to your return.
>
> As to answering where you have checked to determine this, it can vary, you know, it depends. What it depends on is the point

evaluation point, if the gob cannot be traveled in its entirety around a parameter, and even when you do travel around a parameter, you are required to check your taps or your connectors for excess of methane.

Now, where we get into the point of going inby further than the approved point, if an inspector finds an excess of 2 percent, and that area is accessible for examination, in other words, it is safe, no one is going to be endangered by roof or what have you, he should be going inby to determine, because in a lot of cases, you maybe only have to go a couple feet inby that point and you have the explosive mixture. So, in reality, you have a gob with over 5 percent of methane.

Q. So what you are stating is that -- if I can sort of extract from this, and the purpose of 329 -- the 2 percent at this area would supposedly reflect an explosive range farther in? Is that what you are saying?

A. Not in all cases. What I am saying is that the 2 percent point -- management establishes that point through their vent plan, under 316, is an area that they go on a weekly basis to make an examination.

* * * * * * *

Q. In your experience, Mr. Kuzar, when a company submits a bleeder evaluation point, what are they submitting that -- what is the purpose of that point?

A. The purpose of them submitting for a bleeder evaluation point is something has occurred in that bleeder system that they cannot travel it in its entirety. The purpose of bleeder evaluation points were

finish some way to evaluate a gob, because in those days, they did not have to make good bleeders and leave them open. They normally pillared from the solid to the solid.

Now, today, since '69, most vent plans, they require to leave a standing room, in other words, a bleeder system that goes around the entire perimeter of that gob. But there are cases where management uses all steps, everything that is available to them to maintain this entry safe for travel and weekly examination, but they just can't hold it up.

So then management establishes a point where they can get the best evaluation of that gob without it being influenced by another split of air. It is submitted to the district manager. The district manager reviews it, he grants either tentative approval or final approval. If it is tentative approval, what happens then is it is sent out to the field office, an inspector is sent in there to determine if this is an adequate evaluation point, or, you know, area to evaluate it, but they establish the point.

Q. And you have stated -- I just want to make this clear in my own mind -- that they establish the point. One of the reasons they establish the point is for the purpose of evaluating the air.

A. Yes, ma'am, because they can no longer travel -- something has occurred in that bleeder entry that they can't travel it in its entirety. Normally, what is established is an inlet on one side and an exhaust on the other. So you are showing a drop of pressure across that gob by your readings you have here, your reading on your return side, and that reasonably assures that there is an air flow across that gob.

make sure that it has not been influenced by the air coming down the main return?

A. Yes, ma'am. If I may, there is one other thing that I could add on these gobs. In a lot of instances, we use methane drainage holes from the surface. If, say, we can't get a good flow over the gob, they will drill a hole down into the gob from the surface. A lot of companies, they put pumps on. They pump the methane out, or else they leave it on free flow, because of a problem in a gob, due to caving type where you are not getting a good flow.

Mr. Kuzar stated that the required amount of air over a gob is whatever it takes to dilute any methane, and the limit at the bleeder evaluation point is 2 percent (Tr. 76). Mr. Kuzar was of the opinion that the 3.3 percent methane found by Mr. Sparvieri at the bleeder evaluation point, and the 4.0 percent he found inby that point, were not acceptable levels in those mine areas. He explained that there was an excess of 2 percent at the bleeder point, and as he proceeded inby it kept increasing, and he would have had an explosive level had he gone further (Tr. 78). Mr. Kuzar was of the opinion that the 3.3 and 4.0 percent methane indicated that the gob was not being properly ventilated (Tr. 81-82), and he explained as follows (Tr. 83-84):

THE WITNESS: The basis, what I have, is what they had to do to correct the condition to assure that the gob was properly ventilated. You had air going both ways on the gob, which, in turn, it was bottlenecked. The methane was bottlenecked in the gob. You didn't have the inlet entries. What they were required to do through the District, to assure that this gob was ventilated properly in the future, they drove entries and they had to cut into it to establish new inlet points to induce air over the gob.

JUDGE KOUTRAS: Is that what they had to do to terminate this particular citation?

Q. Mr. Kuzar, I know this may be difficult, but even without your order of the next day, just assuming that all you knew about this area was that you had traveled it and that Mr. Kuzar had found 3.3 percent methane, and then found 4 percent methane as he went further on, would you consider that to be -- in your opinion, is that indicative of proper ventilation in the mine?

A. There wasn't proper ventilation there, or you wouldn't have had it. You wouldn't have had the methane.

Q. Why would you not have had the methane there had there been proper ventilation?

A. Because the amount of ventilation that would have coursed across the gobs, it would have diluted it at the E.P. point. By the time it reached the E.P. point, it would have been down at 2 or below.

Mr. Kuzar stated that MSHA's policy is that the ble evaluation point is where an operator checks for compliar with section 75.329, to insure that no more than 2 perce methane is present at the point the air enters another s Checks may also be made at bleeder taps or connectors. ever, if an inspector determines that the bleeder point being influenced by another split of air, that bleeder l tion may be rejected, and another location is establishe where a true evaluation of the gob may be made of only t air coming over the gob (Tr. 88). He stated that MSHA h fixed policy as to how close to the return one must be t make a methane check (Tr. 90). He explained MSHA's meth for determining whether an operator fixes his evaluation point too close to the main return air course as follows

A. What the inspector would do, he would use a smoke cloud. Now, if that air was going in towards that gob off of that return, he would have to follow that smoke to the point where the smoke changed and started coming out, so

air direction.

Q. And that is what the inspectors do to determine whether or not the bleeder evaluation point is an accurate determination of the air coming off the gob?

A. That is what they do when they cannot use an anemometer due to low velocities.

On cross-examination, Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329 (Tr. 92). Referring to the operator's exhibit O-1, and in response to several hypothetical questions, Mr. Kuzar marked the sketch to indicate where the air coming off the gob would meet with the air coming off the split on the right-hand side of exhibit (Tr. 96). Assuming a methane reading of 1.2 percent at that location, Mr. Kuzar stated that the operator would be in compliance with section 75.329, but not at the BE-14 location where 3.3 percent methane was detected. If the only test was made at the location where 1.2 percent methane was found, the operator would be in violation of section 75.316 for not testing at the approved BE-14 location (Tr. 99).

Mr. Kuzar stated that he did know as a fact that the ventilation plan for the No. 1 Mine required that all bleeder evaluation points have methane readings of 2 percent or less (Tr. 100).

In response to further questions regarding exhibit O-1, Mr. Kuzar stated that a true reading of the air coming off the gob could not be made at the location marked with a "X" because the air coming off the gob outby BE-14 is going out through the connector shown on the left-hand side of the sketch. The proper place to test would be inby the BE-14 location where the total uninfluenced air is coming off the gob and before it enters the other split (Tr. 101-102).

Mr. Kuzar stated that in District 2 there is an oral policy concerning the proper location to test for methane pursuant to section 75.329, that the policy is consistent throughout the district, and that he instructs his inspectors to proceed in the manner previously described (Tr. 102-103). Mr. Kuzar confirmed that District Manager Donald Huntley's

Mine Foreman Richard Endler identified exhibit O-2 as a portion of the mine map depicting the location of bleeder evaluation point BE-14. He stated that the BE point in question was probably established and approved in 1981, and he agreed that it is in an area which cannot be travelled because of hazards or roof conditions. The BE was located there so that mine management can establish air flow through this area of the mine (Tr. 109).

Mr. Endler identified exhibit O-3 as an enlarge diagram of the location of BE-14, and he explained his understanding of the proper procedure for checking methane at the mixing point (Tr. 110). He marked an "X" on the diagram as the location of the air mixing point in this case. He stated that he was instructed by MSHA supervisor James Biesinger and MSHA ventilation specialist Richard Schilling to use a chemical smoke tube at the midline of the entry to the right of the diagram where the air is coming off the main return, and to follow the smoke as it swirled to a point where it would proceed back out into the main return. He would then take one step inby that location and take his methane reading (Tr. 110). He stated that he instructed his foreman to make methane checks following this same procedure (Tr. 111).

Mr. Endler stated that assuming a methane reading of 3 percent methane at the location of the "X" on the diagram there would be no violation of section 75.329. Assuming methane readings of 2.9 and 3.1 at the BE-14 location, he would still be in compliance with section 75.329, because Mr. Biesinger and Mr. Schilling instructed him that he was allowed up to 4.5 percent methane at bleeder connectors, but at 4.5 percent the mine had to be withdrawn. He was also instructed that where the bleeder connector was influenced by the main return, and that the location where methane had to be below 2 percent was where it dumped into the main return (Tr. 111-112).

On cross-examination, Mr. Endler confirmed that the methane percentage figures which appear on diagram exhibit O-3, were the readings obtained by the management representative who accompanied Inspector Sparvieri during his inspection (Tr. 113). Mr. Endler had no reason to dispute the 3.26 methane reading at BE-14 made by MSHA's Mt. Hope laboratory, even

Mr. Endler disagreed that the 1.3 methane reading at t "X" location on the diagram resulted from the air coming of BE-14 going down the crosscut immediately outby BE-14. He believed that the 1.3 reading resulted from the 1,311 CFM a current diluting the methane as it approached the main retu (Tr. 114). He did not believe the air from the main return affected the 1.3 reading because it was taken "inby where t split dumps" (Tr. 115).

In response to further questions, Mr. Endler stated th he received his instructions from Mr. Biesinger and Mr. Schilling orally underground at the mine. He reiterate that he was instructed to break the smoke device to determi where swirling air stopped and ended, and to take a step in which would be 3 feet, and to test at that point (Tr. 116).

Mr. Endler confirmed that he was not with Mr. Sparvier during his inspection. It was his understanding that Mr. Sparvieri made his methane reading at the BE-14 locatio for a distance of 10 feet as the air flowed down the entry rather than at the point where it dumped into the return (T 117).

Mr. Endler stated that the distance from BE-14 to the "X" location on exhibit O-3, is approximately 70 feet. Ass ing methane readings of 2.9 to 3.1 at location BE-14, decre ing to 1.3 at the "X" mixing point, and .4 in the return, i was his opinion that the bleeder was "doing what it was sup posed to" in diluting, rendering harmless, and carrying awa the methane in the area. In the outby area, the methane wa only .4 percent and 27,000 CFM's of air was coming down the return (Tr. 119).

Mr. Endler stated that the MSHA instructions he receiv with regard to the procedure for testing for methane were received in approximately May, 1984, and he conceded that t individuals who instructed him were not in the area of BE-1 (Tr. 119).

Mr. Endler stated that the mine ventilation plan refle approximately 60 bleeder evaluation points, but that the pl does not state that the methane level at those points has t be at 2 percent. However, he conceded that if an inspector finds 3.1 methane at any bleeder evaluation point he will

stated that all of the coal had been pillared out and extracted and the area was caved. The area had rock acros it, it was not an opening that one could travel through, the "cross hatches" on the diagram indicates a cave area occurred in 1981, and no airflow would be going in that d tion (Tr. 128-129). Mr. Endler indicated that the caved extended to the corner of the rib of the crosscut shown o diagram, but conceded that it was possible for some of th to seep through the caved area since they are not air tig (Tr. 131-132).

Mr. Endler explained the effect of the air coming of the gob at BE-14, and the caved crosscut as follows (Tr. 135-138):

> JUDGE KOUTRAS: Mr. Endler, you have heard all the argument now. What is the effect of the undiluted air theory in your mind? I mean have you heard about that you are only supposed to test air that is undiluted to determine whether or not the gob ventilation is doing its job?
>
> THE WITNESS: Yes, sir.
>
> JUDGE KOUTRAS: Isn't this air being diluted if it goes down this --
>
> THE WITNESS: No, sir, that is all gob. The main return is one crosscut away from there.
>
> JUDGE KOUTRAS: Do you mean to tell me that the air coming down this entry, some of it is not going to escape down here?
>
> THE WITNESS: It is all the same air.
>
> JUDGE KOUTRAS: What do you mean it is all the same air?
>
> THE WITNESS: It's all the same air that is coming through the gob. It is not being diluted by the return air. That air that is

way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Does some of it go down this way?

THE WITNESS: Yes, but it is still trying to get out to the main return.

JUDGE KOUTRAS: I don't care whether it is trying to. Is some of it going down this way?

THE WITNESS: Possibly.

JUDGE KOUTRAS: And could theoretically some of the methane seep out down that way?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And would that be an accurate reading at this point?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Why would it be accurate at this point if some of it is escaping?

THE WITNESS: Because the majority of it would be going down that entry to get to the main return because it is an open entry. The rest of it -- there may be some -- I can't deny that there might be some filtering through the cave. But that is what your air is supposed to do. It is supposed to filter through all of the cave and dilute and render harmless all the methane in the entire cave, not just one specific area.

* * * * * * *

Q. The language of 329 is, ". . . when tested at the point it enters such other split." -- referring to another split of air. If air

air?

A. No. No, it's not.

Q. Where is your other split of air?

A. It's the same split of air that is coming from that entire gob that is going through there. It is the same air.

Q. Where is the other split of air.

A. The other split of air is over here in the main return that this air is trying to filter into.

Mr. Endler conceded that a 3.26 percent methane reading at the BE-14 was not personally acceptable to him, and that he would not be satisfied with 3 percent methane at any BE location because he believes it is dangerous. Although MSHA representatives had advised him that up to 4.5 percent methane is acceptable for air coming off the bleeder connectors as a matter of law, Mr. Endler's personal opinion is that it is not acceptable (Tr. 139-140). He admitted that as a mine foreman, he would not be comfortable with 3 or 4 percent methane at the BE point because he would be concerned that the ventilation may not be adequate (Tr. 141, 143-144).

Larry Luther, testified that he has 17-1/2 years of mining experience and that he is employed by the respondent as surveyor, and periodically performs duties as a mine examine examining BE points and air courses. At the time the citati was issued in this case, he was performing these duties (Tr. 151).

Mr. Luther confirmed that he travelled with Inspector Sparvieri on March 16, 1984, and that six BE points were exa ined that day (Tr. 152). Referring to the diagram, exhibit 0-3, Mr. Luther stated that he and Mr. Sparvieri walked up the return to the BE-14 location and he made a methane readi of 2.9 to 3.1 percent, and Mr. Sparvieri recorded 3.3 percen Mr. Luther recorded 2.5 methane outby the BE-14 location, 1. further outby, and .4 further outby. Mr. Sparvieri believed it was safe, and they returned to the BE-14 location and inb Mr. Luther recorded a reading higher than 2.9 inby the BE-14 location (Tr. 152-153).

Mr. Luther stated that after making the methane test he and Mr. Sparvieri continued to take air readings, but anemometers would not turn. Mr. Sparvieri then released puff of smoke from a smoke tube and it went to the roof a then returned outby. They then decided to make an air re with smoke at 10 foot intervals and the smoke was release the BE point. The air was timed at 1,311 cubic feet per ute as it returned out the entry toward the main return t way it was supposed to. He did not recall travelling dow entry immediately outby the BE point (Tr. 153-154).

On cross-examination, Mr. Luther confirmed that he t his methane readings with a hand held CSE methane detecto but that he did not test the air where he recorded 2.5, 1 and .4 percent methane (Tr. 154). After testing the air the BE point, he and Mr. Sparvieri left because he wanted use a telphone, and it took them 45 minutes to an hour to reach the surface. The citation was served on him approx mately an hour and a half later (Tr. 156).

Mr. Luther stated that he had no difference of opini with Mr. Sparvieri at the time he issued the citation and not suggest that he was taking his air reading at the wro place. He confirmed that he has tested for methane at de nated BE points, as well as BE points which have to be mo because of lack of physical access. In these instances, would have to move back 20 to 30 feet to make his tests (156-157).

Mr. Luther agreed with the procedure for making air ings as explained by Mr. Endler, and confirmed that he ha made tests in this manner. Mr. Luther stated that it was understanding that 3.3 percent methane at a BE point was acceptable, but found out differently when the citation w issued. He did not ask Mr. Sparvieri why he was issuing citation (Tr. 158).

MSHA's Rebuttal Testimony

John Kuzar testified that during the 11 years he has in the district he has never known that 4.0 percent metha was permitted at a bleeder evaluation point (Tr. 160). H stated that during the hearing he telephoned his office a spoke with MSHA Inspector Sam Burnatti concerning the min ventilation plan on file in his office. Mr. Burnatti rev

Q. Now, again with your knowledge of this area and trying to concentrate solely on March 16, the day before you issued your citation. We're talking about Mr. Sparvieri's citation. In your opinion, using this map which has been submitted as Operator's Exhibit 3, the area where it's listed as 1.3 methane, is it possible for you to tell from that map whether that would be an acceptable spot to measure under 329, the section that we have been talking about where the split enters the other split?

A. Prior to it entering? Yes, but for the purpose of a B.E. point where it was established, no.

Q. And I would draw your attention to this area which is cave which we have established goes down here. In your experience as a ventilation expert, would it still be possible for air to dilute through that crosscut as we have been talking about here today?

A. Yes, it's possible for air to go over that cave. It depends how tight it is, what have you, the amount, because it's trying to get to return.

Q. Do you consider this to be an adequate spot to measure the air coming off the gob under section 75.329? I am pointing to where it is 1.3 percent.

A. No.

Q. We have heard some suggestions that because the air would have diluted to 1.3 percent at this time the ventilation plan -- or the ventilation that was in effect would have been working, would have been effectively diluting the methane. Do you agree with that statement?

A. If they had 1.3 out here as indicated, yes it would be diluting.

the approved location is for them to evaluate.

Q. And how about where it is 2.5 in the cross-cut area? Is that diluted?

A. No, it's over 2.0.

Q. Are there circumstances which could explain the diminution of the percentage other than having proper ventilation in effect? Do you understand what I am asking?

A. That would have reduced it?

Q. Yes.

A. The only thing that could have reduced it -- distance would have a bearing on it. And if it was being influenced by this other split of air is the only two things that could have had any bearing on a reduction of the amount of methane from this point to this point. The distance -- it's being diluted as it is moving. You have distance here. The same thing down here.

And the reason also, there would probably be some of the methane as indicated here. There was 2.5 here through their readings. So some of this gas was going out this way. So in time if you were to evaluate here, you would not be getting all the methane off of this gob. You are getting it here, but you wouldn't be getting it here because some of the gas is being coursed up this direction. It shows 2.5. And it shows 1.3 here.

Q. So you are saying the fact that 2.5 is there proves that some of the gas is being coursed out?

A. Yes ma'am.

remains that they had over 3 percent at this bleeder evaluation point.

Q. So what you're saying is although it may course out that way, you still are not getting an accurate reading of what is off the gob?

A. Back here?

Q. Coming off here, back here, I'm sorry.

A. No. You are not getting it all. You are getting a portion, a portion of it here and portion of it that is going out through here. That is why the B.E. point is inby this corner. You are getting it all.

Mr. Kuzar stated that while he was aware of citation issued for violations of section 75.316 at the time, he w not aware of any other citations for violations of sectic 75.329 (Tr. 165). He confirmed that prior to the issuanc the citation in this case no one from mine management adv him that the BE point was not an accurate place to measur for air entering another split (Tr. 166).

Mr. Kuzar confirmed that it is MSHA's position that air must be diluted to the point where there is 2 percent lower methane by the time the air reaches any bleeder eva tion point in the mine, and that if it is above 2 percent when it reaches the BE point, the respondent would not be compliance with sections 75.316 and 75.329 (Tr. 170). He confirmed that every approved BE point in the mine is at location immediately before the air is split. Anywhere w there is a possibility that the air would be diluted or escapes after it passes a BE point is not a valid place f testing. The BE point would be established inby such a l tion so that there is a true evaluation off the gob area.

Findings and Conclusions

Fact of Violation

The section 104(a) "S&S" Citation No. 2255016, issue this case by Inspector Sparvieri on March 16, 1984, charg

(50 cc) was collected at this location. The 3.3% of methan was detected with a MSA M402 hand held methane detector."

30 C.F.R. § 75.329, provides in pertinent part as follows:

> On or before December 30, 1970, all areas from which pillars have been wholly or partially extracted and abandoned areas, as determined by the Secretary or his authorized representative, shall be ventilated by bleeder entries or by bleeder systems or equivalent means, or be sealed, as determined by the Secretary or his authorized representative. When ventilation of such areas is required, such ventilation shall be maintained so as continuously to dilute, render harmless, and carry away methane and other explosive gases within such areas and to protect the active workings of the mine from the hazards of such methane and other explosive gases. Air coursed through underground areas from which pillars have been wholly or partially extracted which enters another split of air shall not contain more than 2.0 volume per centum of methane, when tested at the point it enters such other split. * * * (Emphasis added.)

In Itmann Coal Company, 2 FMSHRC 1986, July 31, 1980, Commission review denied, September 2, 1980, final order September 9, 1980, 1 MSHC 2509, former Commission Judge James A. Laurenson affirmed a violation of section 75.329, based on an inspector's detection of 9 percent methane in a abandoned mine area at a point approximately 1/2 mile inby point where two splits of air met. Itmann disputed MSHA's contention that section 75.329 requires that when a ventila tion system is used in an abandoned area, a two-pronged tes must be met: (1) the ventilation system must continuously dilute, render harmless, and carry away methane and other explosive gases; and (2) air from abandoned areas which ent another split of air shall not contain more than 2 percent methane. Itmann contended that section 75.329 should be re as a whole, requiring only one thing; that air from abandon areas which enters another split of air shall not contain m than 2 percent methane. In rejecting Itmann's contention, Judge Laurenson stated as follows at 2 FMSHRC 2001 and 2003

> The legislative history of section 303(z)(2) of the 1969 Act (75.329) indicates that Congress intended for there to be a two-pronged test regarding ventilation of abandoned areas. * * *
>
> * * * Just because the percentage of methane is below 2 percent does not mean that an operator has not violated this section of the Act. Even if the percentage of methane in the air from the abondoned (sic) areas which enters another split of air is below 2 percent, the operator violates this section if it has not maintained ventilation "so as continuously to dilute, render harmless, and carry away methane and other explosive gases" in the abandoned area. The legislative history states that this regulation means that "such ventilation will be adequate to insure that no explosive concentrations of methane or other gases will be in this area." Leg. Hist. 1969 Act at 1044.

In Christopher Coal Company, decided by former Commis Judge John Cook on October 18, 1976, affirmed by the Commission on October 25, 1978, 1 MSHC 1688, Judge Cook affirmed a violation of section 75.329, based on an inspec tor's finding 4 percent methane with a detector (5.38 perc bottle sample), at a cement block regulator in a bleeder e The inspector also measured the methane in the main return a location outby the intersection in the bleeder entry suc that it represented the content after the bleeder split of had joined the main return split, and found 1.6 percent me ane. The operator contended that section 75.329 does not require that the methane test be taken before the bleeder split of air enters the main return split. In rejecting t argument and affirming the violation, Judge Cook stated in pertinent part as follows:

> A plain reading of the regulation makes it apparent that the air which is to be tested is the air which is "* * * coursed through underground areas from which pillars have been wholly or partially extracted * * *," not a

It is clear that the test must be made before the bleeder air actually leaves the bleeder split of air and joins with the main return split of air. To interpret the regulation any other way would make it meaningless since the test, under the Operator's theory, would only indicate what the methane content was in the main return after a mixture took place. The regulation clearly was designed to ascertain what methane content would be entering the main return split of air.

With regard to the question as to whether the place inspector performed his methane test satisfied the requir found in section 75.329 that it be at the point it enters other split, Judge Cook stated that "It is clear that the of the bleeder split of air is to be made as close as is sonably possible to the place where the two splits of air but before the bleeder air enters the other split." On t facts presented, Judge Cook made the following additional findings:

MESA has proved that the inspector took the readings as close as is reasonably possible. As set forth above the inspector stated that he took the measurements and sample at the regulator because of the turbulence caused by the intersection of the main entry split of air with the bleeder split of air as well as by the regulator itself. He was of the opinion that he took the measurements at the location where they would be most accurate because of the turbulence between that location and the actual intersection of the two entries (Tr. 26-27, 31, 57-58, 65, 71-72). He stated that that measurement would show the methane content in the air current coming out of the bleeder entry (Tr. 30).

The Operator has not challenged the fact that such turbulence existed. In fact the General Superintendent of the Osage Number 3 Mine stated that there could be turbulence within the 13 south entry (the bleeder entry)

tor, it is possible to get a fairly accurate volume and methane reading. He described swirls and eddys beyond the area where the measurement was taken, caused by the regulator and by the intersection of the two splits of air (Tr. 92-93).

It is therefore apparent that the inspector took his readings at a location as close as is reasonably possible to the place where the two splits of air join, but before the bleeder air entered the main entry. It does not appear that there are any factors affecting the bleeder air which could decrease its methane content between the place of measurement and the actual physical intersection of the two entries.

* * * * * * *

In light of the mandate of the federal courts, a narrow, restrictive reading of the Act will not be made. Under the facts in our case, the operator has in effect asserted, among other things, that the tests for methane should have been made at the point where the bleeder entry and the main entry intersect. The problem, however, was that the turbulence in the Osage No. 3 Mine at that point would result in an inaccurate reading (Tr. 27, 31, 34, 55, 61, 62, 63, 65, 91, 93, 102, 108). The inspector made his measurements in what he considered was the "threshold of the splits" (Tr. 70). He made his test at a location which was the point nearest to the place where both splits joined, that he could obtain an accurate measurement (Tr. 26-27).

Consequently since it is apparent that the inspector performed the test of the bleeder split of air at a location which was as close as was reasonably possible to the point where the two splits of air joined, it is found and concluded that MESA has proved by

In its posthearing brief, Greenwich agrees that the Itmann Coal Company and Christopher Coal Company decisions a applicable precedents in the case at hand. Greenwich also cites a decision by Judge Melick in Beckley Coal Mining Company, 3 FMSHRC 2593, November 9, 1981, vacating a violati of section 75.329, because of the alleged failure by Beckley to reduce the methane concentration to below 2 percent in a bleeder system crosscut.

In the Beckley case, the inspector measured more than 3 percent methane in a panel from which pillars had been wholly or partially extracted and had been abandoned as a go area. Four bottle samples were taken and the methane conten was 2.71 percent, 2.67 percent, 2.74 percent, and 2.73 per- cent. The inspector further stated that the air movement wa minimal; however, he did not use an anemometer or smoke tube to measure the air movement. The operator disagreed with th inspector's evaluation of the air movement, and the next day simulated the same conditions as the inspector found, then conducted a smoke tube test. The released smoke moved out o the crosscut and into the bleeder.

In dismissing the violation, Judge Melick stated that t question of whether a violation of section 75.329 exists depends on the adequacy of the ventilation system, and not solely upon the levels of methane found in any particular crosscut. The test applied by Judge Melick was whether the ventilation system is being "maintained so as to continuousl dilute, render harmless and carry away methane." He conclud that the only evidence to suggest the inadequacy of the vent lation system was the one time series of methane readings showing a non-explosive 2 percent to 3 percent methane conce tration and the inspector's opinion that there was no percep ble movement of air.

Greenwich submits that no violation of section 75.329 occurred based upon the methane levels detected on March 16, 1984. Greenwich asserts that it had a reading of 1.3 percen methane at the mixing point-less than the violative 2 percen -- and a reading of 3.3 percent at bleeder evaluation point No. 14 -- less than the violative 5 percent explosive range and that MSHA has presented no credible evidence that Greenwich violated section 75.329 by failing to maintain its ventilation so as to "continuously dilute, render harmless and carry away methane and other explosive gases" and "to

such methane and other explosive gases.

Greenwich concludes that its testimony demonstrated th the ventilation in the vicinity of bleeder evaluation point No. 14 was acting properly and in compliance with section 75.329, and that the ventilation there was in fact diluting rendering harmless and carrying away methane as evidence by the 1.3 perent reading at the mixing point.

MSHA did not file a posthearing brief in this case. However, during oral argument presented at the close of the testimony, MSHA's counsel agreed that the cases cited by Greenwich, including the two-prong test enunciated in those decisions, would apply in any determination as to whether Greenwich has violated section 75.329.

MSHA argues that the legislative intent of section 75.329, is to preclude the build-up of explosive range of methane in abandoned gob areas. MSHA also agrees that section 75.329 requires the mine ventilation to be maintained as to continuously dilute, render harmless, and carry away methane and other explosive gases from such areas. MSHA al agrees that the 2 percent methane requirement found in section 75.329, is an additional precautionary provision to insure against methane above that level finding its way int another air split where the air coming off the gob enters that other split.

MSHA asserts that on the facts of this case, the bleed evaluation point is the most accurate location for the taki of methane tests, and that Greenwich has offered no evidenc to establish that its 1.3 percent methane reading at the mi ing point was not affected by air turbulence from the main return. MSHA finds "a problem" with the crosscut immediate outby the bleeder evaluation point, and states that credibl testimony from its witnesses reflects that the crosscut its could have diluted the air directly off the gob. Citing th Christopher Coal Company case, MSHA agrees that the methane test should be made as close as reasonable possible to the point where the two splits of air joined in this case. Sin accuracy is important, MSHA asserts that section 75.329, should be liberally construed to insure that any air coming off the gob was not a dangerous percentage. Since bleeder evaluation point 14 was located directly before the crosscu in question, MSHA believes that the evaluation point is the most accurate place to test for methane. Assuming that I f

Mining Company case, MSHA asserts that it is distinguishable from the fact presented here, notwithstanding Greenwich's arguments that 3.26 percent and .4 percent methane readings are not in the "explosive range." MSHA points out that Greenwich conceded that 3 percent methane would cause them concern, and that the mine had experienced a prior explosion and that it was "obviously" experiencing problems with methane and its ventilation.

Greenwich argues that the mixing point for bleeder evaluation No. 14 was at the point shown on exhibit O-3, as indicated by its 1.3 percent methane reading. MSHA's ventilation specialist Kuzar agreed that this was the location where the air coming off the gob would meet with the air coming off the split from the main return (Tr. 96, exhibit O-1). He also agreed that this location would be an acceptable spot to measure the methane pursuant to section 75.329 prior to the air entering the other split. Mr. Kuzar conceded that the 1.3 percent methane reading at that location would indicate that the ventilation was working effectively to dilute the methane. He also agreed that the 2.5 percent methane reading at the location immediately outby the 1.5 percent reading proves that the methane is being coursed out of the area to the return and he stated that "there would be nothing wrong" with doing it that way.

Mr. Kuzar's disagreement lies in the fact that he believes the proper location to test the air for methane before it reached the mixing point and entered the return split was at the established bleeder evaluation point No. 14 which in this case was located approximately 70 feet from the mixing point spot claimed by Greenwich where it found 1.3 percent methane, and inby the point where 2.5 percent methane was found. Since the methane found at the bleeder evaluation point was over 3.0 percent, Mr. Kuzar questioned the accuracy of Greenwich's readings with respect to the air coming off the gob because he believed that some of it was escaping down the crosscut immediately outby the evaluation point.

Mr. Kuzar confirmed that MSHA has no written policy or procedure concerning where to test for methane pursuant to section 75.329, and he did not know for a fact that Greenwich's ventilation plan required that all bleeder evaluation points have methane readings of 2 percent or less. Mr. Kuzar confirmed that MSHA's district No. 2 oral policy i

exhibits O-1 and O-3, would place it in compliance with section 75.329 at that location, but not at the bleeder evaluation point No. 14 where 3.3 percent methane was detected. H Greenwich tested only at the location where it found 1.2 per cent methane, Mr. Kuzar believed that it would be in violati of section 75.316 for not testing at the designated evaluati point.

In this case, MSHA has presented no credible evidence t establish that the air located at the mixing point as define by Greenwich where it found 1.3 percent methane was influenced by air currents off the main return or by turbulence o swirling prior to it leaving the bleeder and joining with th return air. Inspector Sparvieri made his methane test at bleeder evaluation No. 14 which was approximately 70 to 100 feet inby the mixing point. He made a smoke tube test a the bleeder point to determine whether their was any turbulence or swirling at that location, but made no tests outby that location at or near the mixing point. It seems obvious to me that the inspector's failure to test the air at the mixing point was because he believed the bleeder location wa the proper place to test. In fact, Mr. Sparvieri stated tha even if the test had been made at a location 50 feet before the air entered the split, if the test location were not a bleeder evaluation point, the test would not comply with sec tion 75.329. He also stated that he would not accept any test made at locations other than bleeder evaluation points as compliance even if the air mixing point were 150 to 500 feet outby the bleeder point. Mr. Sparvieri's arbitrary assumptions and conclusions that all of the air outby a bleeder evaluation point for purposes of accuracy and compli ance with section 75.329, are rejected.

Inspector Sparvieri conceded that at the time he issued the citation he was not a ventilation specialist, was unfami iar with the mine ventilation system, was not sure how the gob area was being ventilated, did not know whether the gob area had experienced prior ventilation problems, and that he could not determine what areas of the mine could be affected by the methane which he found. He conceded that the explosi range of methane is 5 perent to 15 percent, and there is no evidence that he detected those levels in this case. Althou he indicated that the air movement at the vicinity of bleede evaluation point 14 where he detected 3.3 percent methane wa

nute, and that the released smoke was travelling outby
area in the proper direction.

Inspector Sparvieri made his initial methane reading at
der evaluation point 14, and he detected 3.35 percent
ane. Readings taken by Greenwich's representative
cted methane between 2.9 percent and 3.18 percent.
ector Sparvieri then proceeded inby the evaluation point
approximately 50 feet, and after 4 percent methane, he
eeded no further. Readings taken by Greenwich outby the
uation point reflected 2.5 percent, 1.3 percent, and
ercent. Inspector Sparvieri could not recall taking and
ings outby the evaluation point.

Respondent's witness Endler testified that based on
nwich's methane readings which indicated decreasing levels
ethane outby the bleeder evaluation point up to and includ-
the mixing point before the air entered the return split,
mine ventilation system was doing the job of diluting,
ering harmless, and carrying away any methane from the gob.
ointed out that the methane in the outby areas was only
ercent and that 27,000 CFM's of air was coming down the
return.

Mr. Endler stated that the crosscut immediately outby
der evaluation point 14 was not an open entry, and that
of the coal had been pillared and extracted from the area
that it had caved. Rocks were across the entry and it
d not be travelled. He conceded that the caved area was
"air tight" and that it was possible for some of the air
ind its way into the area before reaching the mixing
t. However, he indicated that the air is supposed to
er through the caved area to dilute any methane which may
resent, but that the majority went to the return. He
eved that the 1.3 percent methane reading at the mixing
t resulted from the 1,311 CFM air current diluting the
ane as it coursed its way to the main return, and that
air from the return did not affect that reading because
as made inby the split location where the air dumped into
return.

Mr. Endler also testified as to the procedures he had
ys followed in making his methane tests at air mixing
ts pursuant to section 75.329, and to insure against any
ible inaccuracies caused by air turbulence or swirling.

MSHA has not established by any credible evidence that
e applicable mine ventilation plan requires that all bleeder
aluation points have methane readings below 2 percent, nor
I find any provision that mandates that bleeder evaluation
ints are the only acceptable locations for conducting meth-
e tests to insure compliance with the requirement of section
.329 that air leaving the gob and entering another split of
r contain less than 2 percent methane.

After careful consideration of all of the evidence and
stimony adduced in these proceedings, including the argu-
nts advanced by the parties in support of their respective
sition, I conclude and find that Greenwich has the better
rt of the argument that it was in compliance with section
.329, and that MSHA has failed to establish a violation by
preponderance of the evidence of record.

I conclude and find that Greenwich has established
rough the credible testimony of its witnesses that the air
ing coursed away from the gob area in its proper direction
the return and out of the mine was in fact decreasing the
ount of non-explosive methane being ventilated through the
b area. I also conclude and find that MSHA has not estab-
shed through any credible evidence that Greenwich's ventila-
on system was not being maintained so as to continuously
lute, render harmless and carry away explosive levels of
thane and other explosive gases.

I conclude and find that Greenwich's methane test at the
xing point reflected in exhibits O-1 and O-3, where the
thane was at a 1.3 percent level, was a reasonable and
oper place to take the test to insure compliance with sec-
on 75.329, and that MSHA has not established through any
edible evidence that the air was otherwise diluted or dis-
rbed by a turbulence or swirling, or that Greenwich's meth-
e test was unreliable or inaccurate. Since the test was at
point before the air off the bleeder joined with the air
f the return, and indicated 1.3 percent methane, which is
low the 2 percent mandated by section 75.329, I further
nclude and find that Greenwich was in compliance with that
andard.

George A. Koutras
Administrative Law Judge

.stribution:

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SEP 19 1986

ECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 86-36
Petitioner	:	A.C. No. 40-02831-03519
v.	:	
	:	No. 1 Mine
& G COAL COMPANY, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

efore: Judge Melick

This case is before me upon a petition for assessment f civil penalty under Section 105(d) of the Federal Mine afety and Health Act of 1977 (the Act). Petitioner has fil motion to approve a settlement agreement and to dismiss th ase. A reduction in penalties from $6,800 to $5,780 is roposed. In support of his motion the Petitioner states in art as follows:

> The citations issued herein resulted from an inspection of a fatal accident at respondent's No. 1 Mine, occurring at approximately 8:30 p.m., July 9, 1985. The accident, involving the detonation of explosives, resulted in the death of miner Ricky Kilgore, age 28, a utility man with approximately eight years mining experience. The investigation disclosed that the accident occurred on the maintenance shift and that in addition to the deceased two other miners were physically present in the No. 1 Mine. Further the investigation disclosed that the deceased miner alone had drilled and charged, in sequence, the Nos. 5 and 6 working places in preparation for blasting from the solid. Immediately prior to the blast and resulting accident, the deceased miner called out his intention to set off charges to the two additional miners who were located approximately 180 feet out-by the No. 5 face. The blast of the No. 6 working face resulted in a simultaneous detonation of granulated powder

of materials on the aforesaid mobile drill. Moreover, examination of the No. 6 working place did not reveal evidence of a blown out shot or other abnormality. Attached as Exhibit "A" is a "sketch of fatal explosives accident" which depicts the scene of the aforesaid accident.

As a result of the investigation of the aforesaid accident, the Secretary alleged violations of safety and health standards at respondent's No. 1 Mine as follows:

a. Citation No. 2193274, issued July 12, 1985, alleged a violation of the mandatory safety and health standard at 30 C.F.R. 75.1303.[1/] . . . Said condition . . . was observed during the investigation of the aforesaid fatal accident, the location of same being depicted in Exhibit "A". Because of the hazard associated with an open shot, the use of such a blasting cap as a leg wire is violative of 30 C.F.R. 75.1303.

The inspector deemed respondent's negligence to be low because of the unlikelihood that respondent knew or should have known that the deceased miner was using the blasting cap as a leg wire. Moreover, it appeared respondent provided suitable, permissible wire for use in blasting the face of the coal and that it was respondent's policy that said permissible wire be used. The condition created a danger that employees could be injured by an exploding blasting cap, which event was deemed reasonably likely to occur under the circumstances. Moreover, an injury resulting from such an event could reasonably be expected to result in lost work days or restricted duty for injured miners. The cited condition affected one miner at the time. The circumstances occurred on

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[1/] 30 C.F.R. 75.1303 provides, in part, that ". . . in all underground areas of a coal mine only permissible explosives, electric detonators of proper strength, and permissible blasting devices shall be used and all explosives and blasting

Respondent exhibited its good faith by immediately abating the violation alleged in the citation.

The inspector deemed the violation to be of such a nature as to contribute significantly and substantially to a hazard, which citation was assessed at $30 after giving respondent credit for its good faith. Respondent has agreed to pay this amount.

b. Citation No. 2193275 was issued July 12, 1985, alleging a violation of the mandatory safety and health standard at 30 C.F.R. 75.1307.[2/] . . . The cited standard, which requires the proper storage of explosives and detonators, was deemed to be violated by respondent, which violation resulted in a fatal injury to a miner. The inspection revealed that explosives being used by the deceased miner at the time of the aforesaid accident were stored upon the mobile coal drill depicted in Exhibit "A", not a separate, closed container. The coal drill was located less than 50 feet from No. 6 working place at the time the blast occurred. Although blast destruction prevented a determination of the direct cause of the detonation of the explosives on the drill, it occurred simultaneously with the detonation of No. 6 working face by the deceased. The inspector deemed respondent's negligence to be high in that the inspector determined that the violative method of storing the explosives had been observed previously. Said negligence is subject to some mitigation, however, in that the violative condition occurred on the maintenance shift when fewer miners were working; the deceased miner had alone prepared the Nos. 5 and 6 faces for blasting and the respondent had provided appropriate and proper storage facilities near the working sections which the deceased could have used.

The condition cited resulted in the occurrence of the event against which the cited standard was

though two additional miners were working approximately 800 feet out-by the working face. Respondent exhibited its good faith by immediately abating the violation alleged in the citation by requiring the storage of explosives in the section storage magazines.

The inspector deemed the violation to be of such a nature as to contribute significantly and substantially to a hazard which citation was specially assessed at $6,500. The Secretary believes that because of the aforesaid mitigating factors related to respondent's negligence, a small reduction in the assessment is appropriate and, therefore, it is proposed a penalty of $5,750 be assessed, which respondent agarees to pay.

I have considered the representations and documentation tted in this case, and, while I do not necessarily agree the rationale advanced, I conclude that the proffered ement is appropriate under the criteria set forth in on 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is ED, and it is ORDERED that Respondent pay a penalty of 0 within 30 days of this order.

Gary Melick
Administrative Law Judge

ibution:

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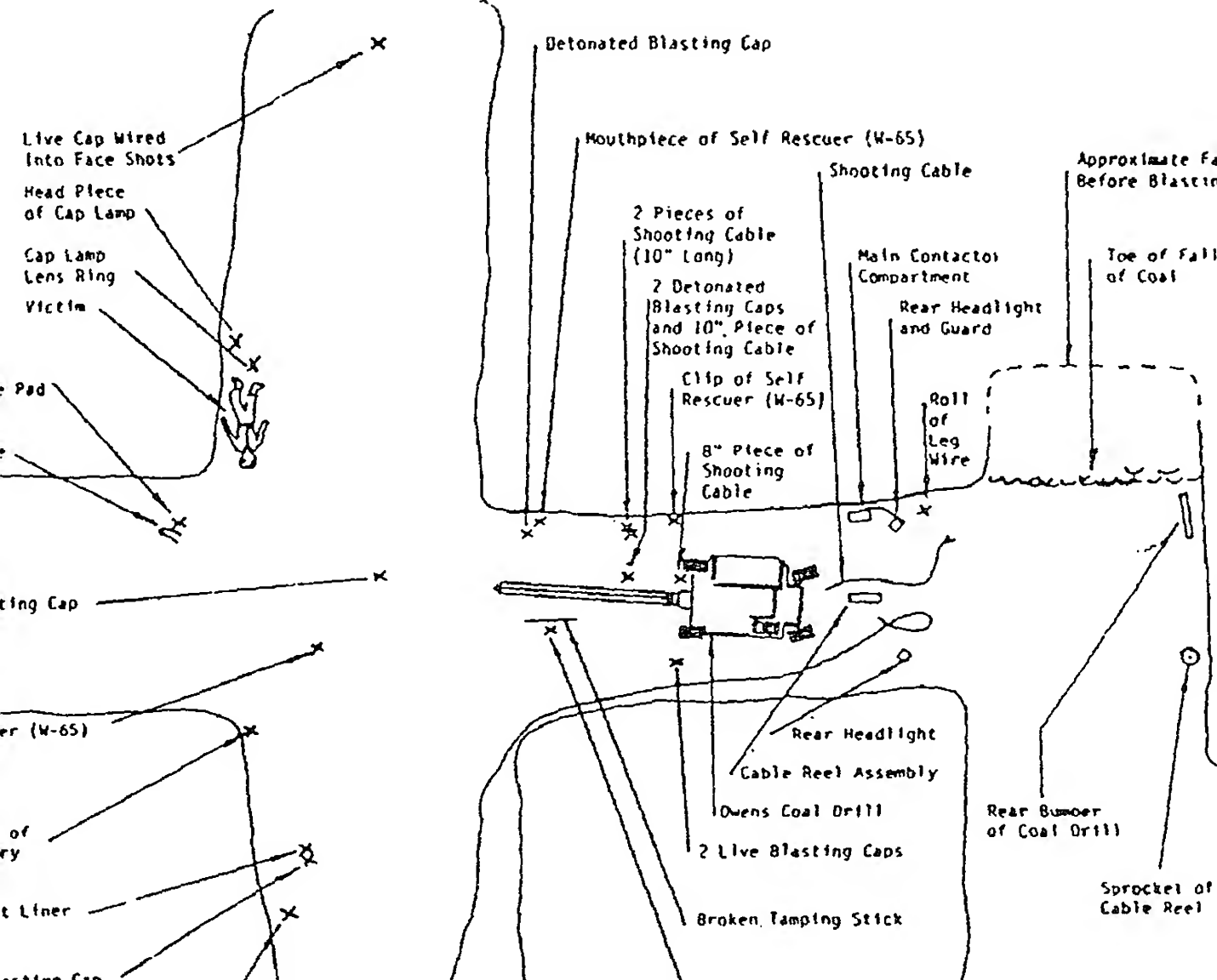
Live Cap Wired Into Face Shots
Head Piece of Cap Lamp
Cap Lamp Lens Ring
Victim
Pad
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of
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t Liner
Detonated Blasting Cap
Mouthpiece of Self Rescuer (W-65)
Shooting Cable
Approximate Fa
Before Blastin
2 Pieces of Shooting Cable (10" Long)
Main Contactor Compartment
Toe of Fall of Coal
2 Detonated Blasting Caps and 10" Piece of Shooting Cable
Rear Headlight and Guard
Clip of Self Rescuer (W-65)
Roll of Leg Wire
8" Piece of Shooting Cable
Rear Headlight
Cable Reel Assembly
Owens Coal Drill
2 Live Blasting Caps
Broken Tamping Stick
Rear Bumper of Coal Drill
Sprocket of Cable Reel

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-52-M A.C. No. 01-00629-05509
v.	:	Roberta Cement Plant
BLUE CIRCLE INCORPORATED, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 5 and September 11, 1986 the parties submi a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $4000 and the parties propose to settle for $1600.

Two violations are involved in this proceeding, both cited following an investigation of a fatal accident on October 8, 1985 when an employee was struck by a piece of liner plate which fell approximately 40 feet from a work platform. The operator was cited for failing to provide toe boards on the work platform (30 C.F.R. § 56.11027), and failing to keep the platform clean and orderly (30 C.F.R. § 56.20003(a)). The motion states that the Secretary cannot establish that the toeboards would have prevented the accide The work being performed was performed on an infrequent basi and toeboards had been installed in other areas of the plant The motion states that the failure to install them on the work platform involved here was apparently an oversight. Respondent implements annual safety training for its employe and the employees involved had received safety training. Th accident resulted in part from employees not implementing Respondent's procedures and safety rules. The violations were promptly abated.

I have considered the motion in the light of the criter in section 110(i) of the Act, and conclude that it should be approved.

James A. Broderick
Administrative Law Judge

ribution:

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SEP 23 1986

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 86-98
Petitioner	:	A. C. No. 15-05209-03522
v.	:	
	:	No. E-4 Mine
MITCH COAL COMPANY, INC.,	:	
Respondent	:	
	:	

DECISION APPROVING SETTLEMENT

This matter is before me on the parties' motion to appr settlement reducing the amount of the penalties proposed by percent due to the depressed state of the market for coal an consequent impact on the operator's ability to continue in business.

Based on an independent evaluation and de novo review c justification for the reduction, I find the same is in accor with the purposes and policy of the Act.

Accordingly, it is ORDERED that the motion be, and here is, GRANTED. It is FURTHER ORDERED that the operator pay th amount of the penalty agreed upon, $500.00, in installments $250.00 each due on or before Monday, October 20, 1986 and Thursday, November 20, 1986. Finally, it is ORDERED that, subject to payment, the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U. S. Departme Labor, 280 U. S. Courthouse, 801 Broadway, Nashville, TN 37

SEP 23 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DENNIS C. JONES, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. WEVA 85-299-D
	:	MSHA Case No. MORG CD 85
	:	Martinka No. 1 Mine
v.	:	
SOUTHERN OHIO COAL CO., Respondent	:	

DECISION

Appearances: Howard Agran, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvan for the Petitioner;
Robert M. Steptoe, Jr., Esq., Steptoe and Joh Clarksburg, West Virginia, for the Respondent

Before: Judge Kennedy

This discrimination case was brought on behalf of an employed miner to redress a loss of overtime pay for an all act of retaliation in reporting a roof control violation. Secretary claims the transfer of Dennis Jones from the mine super section to an equivalent job on another section witho loss of pay, seniority, or benefits other than eligibility optional overtime pay violated section 105(c)(1) of the Min The operator defended on the ground the challenged transfer justified because Jones and his partner on the twin-headed bolter engaged in a work slowdown that resulted in serious harmony and dissension among the workforce assigned to the A Section (the super section) during August and September 1

Findings

Dennis Jones was and is an unregenerate safety activis it comes to roof control violations. And with good reason. is a roof bolter--and a very good one--when he wants to be.

e Protected Activity.

For years Dennis Jones had been among the most "vocal" of e miners employed at the Martinka No. 1 Mine about safety zards, and particularly violations of the roof-control plan. r approximately a year and a half prior to the incident that iggered this complaint Mr. Jones regularly complained to his reman, the mine safety committee, various members of top nagement and MSHA about a violation of the roof-control plan at he considered especially egregious. The provision his mplaint centered on read as follows:

> Where resin bolts are used as primary roof support, the place shall not be left on temporary supports for more than 8 hours. Bolting the roof with resin as soon as practicable is critical for successful results. The only deviation from this procedure will be where there is a mechanical/electrical failure on the roof bolting machine or when a work stoppage occurs. (G-1, p.17, para. 6).

ere was no dispute about the fact that working faces (places) re being left totally unsupported for periods of up to hours, especially on the weekends, i.e., from midnight Friday ght to midnight Sunday night. Since Mr. Jones worked the dnight to 8:00 a.m. shift, the first shift, it often fell his t to be directed to bolt cuts at the working faces that had ng unsupported over Saturday and Sunday. He complained about is on his own behalf and on behalf of his fellow workers. itially his complaints were supported by the mine safety mmittee. MSHA, however, refused to investiagate or cite the ndition, management refused to take any corrective action and e mine safety committee, while sympathetic, did not consider e practice sufficiently hazardous to justify a work stoppage r a hazardous or imminently dangerous practice. Nor did . Jones or his coworkers ever invoke the individual safety ghts provision of the collective bargain agreement to withdraw eir services individually or collectively because of an normally hazardous practice or condition.

MSHA and management took the position that tests of the erlying roof strata showed the deflection in the roof over a -hour period was insufficient to warrant enforcement of an nour limitation or 30 C.F.R. 75.200. They felt that the roof flection tests when coupled with the provision for the use of

Mr. Jones as well as the mine safety committee knew that
fter introduction of the ATRS, neither management, MSHA nor
est Virginia Department of Mines considered the 48 hour prac
nsafe.

Automated Temporary Roof Support (ATRS) Systems on roof
olters eliminate the need for temporary support posts and pr
ect roof bolters from unintentional roof falls through hydra
ally activated and supported steel canopies. 50 F.R. 41784,
1792-41794 (1985). Thus, the reference in the plan to "temp
ry supports" was rendered obsolete by the new technology.
ndeed, the steel canopies provided greater protection for
r. Jones and his partner than that provided under the tempor
upport procedure. Even so, Mr. Jones felt that the requirem
hat resin bolts be installed "as soon as practicable" and th
nly a "work stoppage" or machine failure justified a "deviat
rom the 8 hour limitation mandated enforcement of that limit
ion. He believed the deflection or sag in the roof that wou
ccur over a 48-hour period would, in the long run, seriously
etract from the effectiveness of the resin bolt bond in the
ying roof structure. As noted, because test hole observatio
ndicated the contrary, management, the state agency and MSHA
ot agree that the amount of separation and deflection that c
e expected to occur created any hazard to the long run stabi
f the resin bolt bond, once installed.

For these reasons, management paid little attention to
r. Jones' complaints and, it seems clear, hardly looked upon
hem as a basis for disciplinary action.

The solicitor's suggestion that Jones' threat to carry h
omplaint to the resin bolt manufacturer created a fear that
ered his transfer is illogical, speculative and without pers
ive support in the record. There is no evidence that the bo
anufacturer would have agreed with Jones or that MSHA or the
est Virginia Department of Mines would have changed their po
ions in view of the testing that had been done and the reque
or modification of the 8 hour limitation that had been under
iscussion since January. This change was formally submitted
SHA on July 24, 1984, approximately 2 weeks before Inspector
owers declined to take action on Mr. Jones' complaint of
ugust 8, 1984.

practice--later sanctioned by a change in the approved roof-control plan--was not unsafe. Indeed, the record shows that August 24, 1984, some 6 weeks prior to the complaint of October 1, 1984, the union safety committee had agreed to an extention of the 8 hour limitation to 24 hours. And shortly thereafter, on February 5, 1985, the provision in the roof-control plan relied on by Jones was changed to read as follo

> Where resin bolts are used as primary roof support, the place shall be bolted on the next production shift, or within 48 hours. The only deviation from this procedur will be where there is a mechanical and/or electrical failure on the roof bolting machine or when a work stop occurs. (GX-10).

While I have given Mr. Jones the benefit of the doubt i finding he had a good faith belief in a hazard, I also find circumstantial evidence shows that Mr. Jones did not take hi complaint to grievance; did not view the hazard as serious e to justify an individual refusal to work; and that neither h coworkers, nor the safety committee considered it sufficient dangerous to justify a legally sanctioned work stoppage. Be Mr. Jones knew or should have known that the ATRS System pro him from any immediate hazard and that the weight of the exp judgment was against him on the question of a long run hazar conclude Mr. Jones' belief that the practice in question was unsafe was not reasonable. His complaints were not therefor protected activity. Having failed to make a prima facie cas discrimination for a protected activity, it follows that the complaint must be dismissed.

III

The Unprotected Activity

At the time of the hearing complainant Jones had been employed by SOCCO for approximately 6 years. He had been cl fied as a roof bolter for the last 3 years. Sometime prior July, 1984, Martinka Mine management decided to operate an e mental, continuous mining section designed to increase produ and reduce labor costs. That section was officially denomin 2 East A but was referred to colloquially as the "super sect Operations commenced on July 23, 1984. The section consiste eight 16 foot entries or headings mined by two Joy Continuou miners. Roof control was provided by two Fletcher dual-head

ner four headings. Management's concept was to operate two c
nuous miners with 10 classified or contract (UMWA) miners
stead of the normal complement of 14. Thus, on the super sec
on, mangement eliminated the need for one continuous miner op
or, one continuous miner helper and two shuttle car operators
e one-third reduction in the workforce when coupled with the
nand for a significant increase in production (the "do more w
ss" concept) created a working environment rife with a potent
r labor discontent.

Unlike the two continuous mining machines, which were oper
ed by the same miner, the roof bolting machines each had a se
te crew of two miners. One machine and crew (Tom Cunningham
d Frank Renick) was assigned to the left side of the section,
adings one through four, and the other crew (Dennis Jones and
Hill) to the right side of the section, headings five throug
ght. When bolting operations were completed bolters were
pected to work out of their classification and do needed "dea
rk." This somewhat derisive term was used to described the
nsekeeping tasks so necessary to the safe and efficient opera
on of a section including the moving and servicing of the con
nuous mining machines, scooping, rock dusting, obtaining and
livering supplies to the face area, installing belt and troll
ngers, moving the ventilation and other chores routine to the
intenance and operation of a conventional continuous mining
ction.

The midnight shift foreman, James Kincell, working with th
neral mine foreman, John Metz, selected Jones and Hill as the
ir of roof bolters to work the right side of the section. The
re specifically told that they were part of an experimental
eration, were expected to be self-motivated, and were to act
th initiative at all times to make the operation a success.
ey knew that if they did not produce they could be replaced a
y time. It was emphasized that the roof bolters would be
pected to do work outside their classification as face men an
perform dead work on their own initiative.

The other bosses on the midnight shift were James Layman w
s the section foreman generally responsible for production an
nes Huffman who was the section foreman generally responsible
r construction. Both had responsibility, however, for the
fe, efficient and productive operation of the super section a
whole. Kincell, Huffman, and Layman were well acquainted wit
nes and Hill, knew them to be highly competent at their craf

their work performance.

Jones admitted that while he had for years been making plaints similar if not identical to the ones claimed actions in this case no adverse action had ever been taken against h either before or after this incident. And certainly this in did not have a chilling effect on Jones' complaints which co tinued even after his transfer.

During the first 3 or 4 weeks all went well on the supe section although production was not as high as targeted. Al the middle of August, however, things took a turn for the wo when Layman and Huffman began to receive complaints of frict between the left side bolters (Cunningham and Renick) and th right side bolters (Jones and Hill). The problem arose over failure of Jones and Hill to complete roof bolting assignmen the right side of the section as quickly as everyone knew th could. This meant that an unfair portion of the dead work o both the left and right side of the section fell on Cunningh and Renick. Based on their own observations Layman and Huf went to Kincell in late August or early September and accuse Jones and Hill of "slowing down" on the roof bolting process order to avoid doing the "dead work" after bolting was compl

Jones and Hill contested this. They were supported by continuous miner operator Morris and the two face men. Mor testified he was never delayed by Jones and Hill. This tes mony, however, was not germane to management's complaint of claimed stretchout of bolting assignments to avoid dead wor Neither of the face men, of course, were in a position to ob the claimed slowdown on the bolting assignments or to evalua the two right side bolters' performance as well as their sup visors and the two left side bolters.

Five highly credible eyeball witnesses (Kincell, Huffma Layman, Cunningham, and Renick) testified that from the mid August to October 1, 1984, Jones and his partner Hill regul repeatedly and continuously, i.e., on 4 out of 5 days engag a planned common course of action to avoid the performance o dead work. This caused friction, conflict, disharmony, and sension among the members of the super section crew.

For example, Cunningham and Renick early on complained they would quit the section if Jones and Hill were not repl or the situation corrected. Kincell tried at first to corr

oss and somewhat fearful of provoking a fight or a feud among crew members. Jones, apparently because of his safety com- ints, and Hill, because of his truculence, felt secure. Aft Kincell had personally selected them over Metz's misgivings naturally was reluctant to admit he had seriously misjudged m.

Jones and Hill as wiley, mine-wise contract miners also kn t management was trying to achieve a production breakthrough thus could be expected to take a little dissension so long bolting assignments were done and the dead work did not fal olerably far behind. Where they miscalculated was with thei on brothers, Cunningham and Renick. They just would not tak and went so far as to make a scene and complaint over Jones Hill's blatant work slowdown in front of the general mine ervisor, Mr. Metz. Things also turned against them when cell on more than one occasion observed them in what appeare him to be a loafing or sleeping posture and after he made ti dies that showed they could work twice as fast when they wer ng watched as they did when unsupervised. Cunningham and ick kept up their stream of complaints and openly "ribbed" es and Hill for not helping out with the dead work.

Huffman testified he had confrontations with Jones and Hil several occasions over their delay in installing trolley gers in the track entry on Sundays. Another example of thei tructionist attitude he cited was their consistent refusal t m the continuous miner from the five to the seven entry for vicing so that they could bolt the five entry. They repeate ed to outwait him in the expectation that he would send the hanics to move the miner while they just stood or sat around waited. Jones and Hill knew or should have known they were ng watched and of the scene Cunningham and Renick created in nt of Metz and Kincell. They also knew or should have known the animosity they had engendered on the part of their thers.

Layman was especially bitter over the way they treated him y knew he was new at the supervisor's job. Yet they seemed t to take advantage of him. They knew he and Huffman were rimanded for the complaints Cunningham and Renick made to Me y also knew or should have known that when they took an hour an hour and a half to do a job that Layman knew should have n done in 35 to 45 minutes they were treading on thin ice.

Layman and Huffman as well as Cunningham and Renick co plained loud and long to Kincell who finally, on the basis own observations, decided during the last week in September transfer Jones off the section on October 1 and to put Laym the day shift for further training as a supervisor. The ex for not transferring Hill--namely that he was needed to fir boss--I find unpersuasive. Nevertheless, whatever disparat treatment was involved did not stem from any protected acti By this time management was unimpressed with Jones' complai over the 8 hour limitation. It was also not interested in plining or punishing him. It merely wanted to improve mora the super section and quiet the complaints from Cunningham Renick. This was accomplished by transferring Jones to a s where he was not expected to do dead work but also would no enjoy the option of the overtime he was regularly paid on t super section.

The actual transfer of Jones did not occur until Tuesd October 2, 1984, due to a mistake or misunderstanding on th of the assistant shift foreman. I find no persuasive basis reading into this one day delay any sinister motive on the of management. As I have found, Jones' complaint of Monday October 1 was of a piece with those he voiced on most Monda namely the failure to bolt places on Saturday that left the unsupported over the weekend.

V

Based on a preponderance of the credible, fact specifi dence and the reasonable inferences to be drawn therefrom, constrained to find that the true motive or cause for Jones transfer from the super section on October 2, 1984, was his ticipation with Hill in a stretchout or slowdown of classif work to avoid dead work during August and September 1984. was therefore, no nexus between the claimed protected activ and the reason for Jones' transfer. The operator having ca its burden of showing Jones was transferred for engaging in unprotected activity and that he would have been transferre engaging in that activity alone, it follows that the compla must be dismissed.

VI

Conclusion and Order

ot based in whole or in part on any protected activity, was
ated solely by the miner's unprotected activity and would
been effected in any event for his unprotected activity
. Accordingly, it is ORDERED that the complaint be, and
y is, DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

ibution:

d Agran, Esq., Office of the Solicitor, U. S. Department of
, 14480-Gateway Building, 3535 Market Street, Philadelphia,
104 (Certified Mail)

t M. Steptoe, Jr., Esq., Steptoe and Johnson, Sixth Floor,
National Center East, P. O. Box 2190, Clarksburg, WV
-2190 (Certified Mail)

DONALD E. RUNYON, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. KENT 86-58-D
v.	:	
	:	PIKE CD 85-17
BIG HILL COAL COMPANY, Respondent	:	No. 4 Mine

DECISION

Appearances: Joe Friend, Esq., Pikeville, Kentucky, for Complainant;
Charles E. Lowe, Esq., Pikeville, Kentucky, for Respondent.

Before: Judge Maurer

STATEMENT OF THE CASE

This proceeding concerns a discrimination complaint filed by the complainant, Donald E. Runyon, against the respondent, Big Hill Coal Company [hereinafter the "Company"], pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) [hereinafter referred to as the "Act"]. Mr. Runyon initially filed his complaint with the Department of Labor's Mine Safety and Health Administration (MSHA) on September 20, 1985, allegir that he was discharged from the Company's No. 4 Mine on August 18, 1985, because he refused to work underground in the mine. He went on to state that he was hired as an "outside man" and thus when he was abruptly informed one morning that he was to work underground, he refused because he felt this mine was unsafe. At that point, he allegedly was told he was no longer needed. Following an investigation of his complaint, MSHA determined that a violation of section 105(c) had not occurred, and thereafter Mr. Runyon filed his complaint with the Commission, pro se. By his complaint, he sought reinstatement, back pay and recovery o "all losses and expenditures" incurred as a result of his discharge.

Pursuant to notice, this case was heard in Paintsville, Kentucky, on July 8, 1986. Donald E. Runyon testified on behalf of himself. Dean Francis, Curtis Francis, and Joe Tackett testified on behalf of the

The complainant testified that he began his employment with the Company in February of 1984, and that he was a welder who worked primarily on the surface but who had gone underground when the job required it some ten times or so during the year and a half he worked there. His employment with the Company terminated on or about August 19, 1985.

He described the sequence of events which immediately led to the termination of his employment. That conversation with Mr. Dean Francis, Company supervisor, is reported at Tr. 63-64:

> A. He said, "Get your hard hat and a light and go underground."
>
> Q. And what did you tell him, if anything?
>
> A. I told him I'd rather not go underground.
>
> Q. Did you tell him why?
>
> A. No, sir.
>
> Q. And then what did he say, if anything?
>
> A. He asked me was I refusing to do my job. I said, "No," I said, "I'd rather not go underground." He said, "Well, then, you're refusing to do your job," and I said, "No, I'm not refusing to do my job." He said, "Well, then, we don't need you." I said, "Well, does that mean I'm fired or what?" He said, "You just fired yourself."
>
> Q. Did he at any time tell you that you were fired?
>
> A. No. That was what he said. He said I fired myself.
>
> Q. And what did you do then, if anything?
>
> A. I just got my stuff together and left.
>
> Q. Where did you go to?

and (2) there had been, in his opinion, two methane ignitions at this mine during the time he worked there, one in February or early March of 1985 and another on May 9, 1985.

Mr. Dean Francis testified for the respondent. His version of the August 19 conversation with the complainant is essentially corroborative (Tr. 88-89):

A. Mr. Runyon come in and I told him -- I said to get him a light and stuff; I had a job I wanted him to do. So, he said, "I'm not going underground." And I said, "Why not?" He said, "I'm just not going underground." I said, "Well, are you refusing to do your job?" But before he said he wasn't going underground, he said he didn't have a hard hat. I said, "I have a hard hat in my truck," which I do. I carry two all the time. Then, after that --

Q. He told you he hadn't brought his hard hat with him?

A. Right.

Q. And you told him that you had one in your truck?

A. Yes, sir.

Q. To go get it?

A. Right.

Q. Did he go get it?

A. No. He started to walk off, then he turned back around and he said, "I'm not going inside.

Q. And then what did he do, if anything?

A. Well, then, he turned around. He said -- I asked him -- I said, "Gene, are you refusing to do your job?" And he said, "I'm not going underground." Then, he turned around and said, "Are you firing me?" I said, "No, I'm not firing you." I said, "You're firing yourself. You're refusing to do the job you were hired for."

ant's assertion that the May 1985 incident referred to above was a methane ignition. He maintains that it was a "blown out shot". He also generally disagreed that the mine was unsafe. He cited the fact that one miner breaking his leg was the only accident that occurred in the mine during Mr. Runyon's tenure there.

Mr. Curtis Francis, also a supervisor at the Company's mine, testified that the complainant never told him he was afraid of anything at the mine until two weeks prior to the hearing in this case. On the 26th of June 1986, he stated the complainant told him he wanted to settle the case and had said, "I'm just going to tell you the truth....I'm scared to go in the mines anymore" (Tr. 169).

Under the Act, a complaining miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd. Cir. 1981); Secretary on behalf of Robinett v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n.20. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. See also Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

Further, it is well settled that the refusal by a miner to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work

Therefore, the initial issue presented for decision is whether Runyon had valid safety concerns. For the reasons that follow, I conclude that he did not.

The complainant's concern about the ventilation fan vibrating on the morning of August 19, 1985, was unfounded for the simple reason that it had been fixed on August 16, 1985, and was no longer vibrating. However, it is true tha Runyon might reasonably have believed that it was still vibrating. This was a new fan that had been installed some three weeks earlier and although it was operating, sucking air out of the mine, it was vibrating because of a cracked weld joint. Runyon's concern was that "anything vibrating like that can go down...and it could go down any time" (Tr. 48). He further speculated that if the fan shut down, and "if I was in there...I wouldn't be called out..." (Tr. 48). This series of speculations does not rise to the status of a good faith, reasonable belief that a safety hazard existed. I further note that complainant introduced no evidence as to the likelihood that such an equipment failure would occur in the first place, thereby giving rise to the feared sequence of events.

As to the two previous instances of methane ignitions (February and May of 1985), complainant has failed to connect them up with his refusal to go underground in August of 1985. The testimony was that the mine is adequately pre-shifted and fire-bossed every day and the complainant does not contest that. I therefore find that this contention likewise does not form a good faith, reasonable belief that a safety hazard existed on the morning of August 19, 1985.

In summary, there is no evidence in this record that the underground work requested of Mr. Runyon would have exposed him to any safety hazards.

I conclude from the totality of the evidence adduced at the hearing in this case that Mr. Runyon had a generalized fear of going underground into this or any other coal mine. His actual grievance in this case is that he believed that he had an outside job on the surface and was reluctant to work underground because of his fear. He wanted to perform only the work on the surface for which

In view of the foregoing findings and conclusions, and after careful consideration of all the evidence in this record, I cannot conclude that Mr. Runyon's refusal to perform his work assignment on August 19, 1985, was based on a reasonable good faith belief on his part that that work would expose him to any underground safety hazards. A miner's belief in a hazard must be reasonable. Unreasonable, irrational, or completely unfounded work refusals do not warrant statutory protection. Robinette, 3 FMSHRC at 811. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

Roy J. Maurer
Administrative Law Judge

Distribution:

Joe J. Friend, Esq., P. O. Box 512, Pikeville, KY 41501
(Certified Mail)

Charles E. Lowe, Esq., P. O. Box 69, Pikeville, KY 41501
(Certified Mail)

SEP 25 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 86-249-R
	:	Order No. 2706369; 3/24/8
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Loveridge No. 22 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-359
	:	A.C. No. 46-01433-03713
v.	:	
	:	Loveridge No. 22 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISIONS

Appearances: W. Henry Lawrence, Esq., Steptoe and Johnso
Clarksburg, West Virginia, for the Contesta
William T. Salzer, Esq., Office of the Soli
U.S. Department of Labor, Philadelphia,
Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

These proceedings concern a Notice of Contest filed b
contestant against the respondent pursuant to section 105(
the Federal Mine Safety and Health Act of 1977, 30 U.S.C.
§ 815(d), challenging the legality of a section 104(d)(2)
issued to the contestant at its Loveridge No. 22 Mine on
March 24, 1986. The civil penalty case concerns a proposa
filed by MSHA for a civil penalty assessment in the amount
$600 for the alleged violation in question.

The contest was heard in Morgantown, West Virginia, on July 29, 1986, and the parties presented testimony and evid regarding the alleged violation. MSHA presented testimony its inspectors, and Consolidation Coal relied on the testim of the mine safety supervisor and preparation plant superin tendent. The civil penalty case was assigned to me after t hearing and the closing of the record.

By motion filed with me on September 22, 1986, pursuan Commission Rule 30, 29 C.F.R. § 2700.30, the parties seek approval of a proposed settlement of the civil penalty case The proposed settlement reflects that MSHA has modified the contested order to a section 104(a) citation, with a corres ing reduction of the assessed degree of negligence from "hi to "moderate," and an amended proposed civil penalty of $30 which Consolidation Coal agrees to pay.

Discussion

Consolidation Coal is charged with an alleged violatio mandatory safety standard 30 C.F.R. § 77.1104, and the cond or practice is described as follows: "Loose coal and coal had accumulated throughout the slope belt headhouse on the structures electrical motors and boxes, black in color, and loose coal has also been allowed to accumulate to where the trail roller and tripper belt are running in loose coal cre fire hazard."

In support of the proposed settlement of the civil pen case, the parties state that they have discussed the six statutory criteria stated in section 110(i) of the Act, and have reviewed the information supplied by MSHA as part of i pleadings and proposed civil penalty assessment with respec these issues. In further support of the proposed settlemen Consolidation Coal asserts that it was unable to attend to cited conditions due to the fact that under a prior order i on February 8, 1986, access to the belt tail house was barr caded. This assertion is supported by the testimony at the hearing in defense of the alleged violation. MSHA acknowle that certain access points to the slope belt headhouse were "chained off" as a result of repairs which had to be made t tripper belt structure leading out of the slope belt headho

Conclusion

After careful review and consideration of the testimony vidence adduced in these proceedings, including the ssions in support of the motion to approve the proposed ement of the civil penalty case, I conclude and find that roposed settlement disposition is reasonable and in the c interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, otion IS GRANTED, and the settlement IS APPROVED.

ORDER

Consolidation Coal Company IS ORDERED to pay a civil ty assessment in the amount of $300 for the violation in ion, and payment is to be made to MSHA within thirty (30) of the date of these decisions. Upon receipt of payment HA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge

ibution:

el R. Peelish, Esq., Consolidation Coal Company, Washington Road, Pittsburgh, PA 15241 (Certified Mail)

nry Lawrence, Esq., Steptoe & Johnson, P.O. Box 2190, sburg, WV 26301 (Certified Mail)

am T. Salzer, Esq., Office of the Solicitor, U.S. rtment of Labor, Room 14480 Gateway Building, 3535 Market et, Philadelphia, PA 19104 (Certified Mail)

SEP 25 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. YORK 86-1-M
	:	A.C. No. 30-00006-05512
v.	:	
	:	Blue Circle Atlantic, Inc.
ATLANTIC CEMENT CO., INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: James A. Magenheimer, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Gary L. Vanniere, Director of Personnel, P.O. Box 3, Ravena, New York, for Respondent

Before: Judge Melick

This case is before me upon a petition for assessment o civil penalty under Section 105(d) of the Federal Mine Safet and Health Act of 1977 (the Act). The parties filed a joint motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $5,311 to $3,311 was proposed. I have considered the testimony and documentation submitted in this case at hearings held August 27, 1986, and I conclude that the proffered settlement is appropriate unde the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of $3,311 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

SEP 26 1986

VICTOR L. TAYLOR, Complainant	:	DISCRIMINATION PROCEEDIN
	:	Docket No. WEVA 86-266-D
v.	:	
	:	MORG CD 86-6
PHOENIX RESOURCES, INC., Respondent	:	

ORDER OF DISMISSAL

Appearances: Larry Leffel, Mine Superintendent, for Respon

Before: Judge Broderick

On September 5, 1986, I issued an order to Complainant to show cause on or before September 19, 1986 why his complaint should not be dismissed because of his failure to appear at the hearing in Elkins, West Virginia on September 1986. Complainant has not responded to the order to show cause.

Therefore, the complaint and this proceeding are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

Distribution:

Victor L. Taylor, P.O. Box 497, Mill Creek, WV 26280 (Certi Mail)

Joseph W. R. Lawson, II, Southeastern Employers Service Co P.O. Box 1848, Bristol, TN 37621 (Certified Mail)

Raymond Parker, President, Phoenix Resources, Inc., P.O. Box 20, Mounterville, WV 26282 (Certified Mail)

slk

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. KENT 85-101 A. C. No. 15-13086-03517
v.	:	No. 2 Mine
C & C ENERGY, INC., Respondent	:	

DECISION

pearances: Joseph B. Luckett, Esq., Office of the Solicit U.S. Department of Labor, Nashville, Tennessee, for Petitioner.

fore: Judge Maurer

Statement of the Case

This proceeding concerns a proposal for assessment of vil penalty filed by the petitioner against the respondent rsuant to section 110(a) of the Federal Mine Safety and alth Act of 1977, 30 U.S.C. § 820(a), seeking a civil penty assessment of $420 for an alleged violation of 30 C.F.R. 75.1701, because of the asserted failure by the respondent drill bore holes in advance of the working faces while thin 75 feet of an abandoned adjacent mine.

The respondent contested the violation and requested hearing. Pursuant to notice, a hearing was convened in estonsburg, Kentucky, on August 7, 1986, and while the titioner appeared, the respondent did not. In view of the spondent's failure to appear, the hearing proceeded with- t him. For reasons discussed later in this decision, re- ondent is held to be in default, and is deemed to have ived his opportunity to be further heard in this matter.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, b. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 C.F.R. § 2700.1 et seq.

The issue presented in this case is whether the petit has established a violation of section 30 C.F.R. § 75.1701 and, if so, the appropriate civil penalty that should be assessed for the violation.

MSHA's Testimony and Evidence

The following MSHA exhibits were received in evidence in this proceeding:

1. A copy of the section 104(a) Citation No. 2463641 issued by Inspector Charles Slone on January 24, 1985.

2. A copy of the section 104(b) Order No. 2463648, issued by Inspector Charles Slone on January 29, 1985.

3. A copy of the Assessed Violation History Report for the respondent's No. 2 Mine from January 24, 1983, to January 23, 1985.

Inspector Slone testified that he conducted a routine spot inspection of the mine on January 24, 1985. When he reviewed the mine map he noticed that this mine had run parallel up beside an old, abandoned mine. After looking at the faces of entries one through six, he knew that entries five and six were mining close to this old adjacent mine. He estimated there was about 75 feet between the closest entry and the old works. Furthermore, while on th sections, he observed that there were no bore holes being drilled in advance of the working faces as 30 C.F.R. § 75.1701 requires.

After the inspector determined that the required bore holes were not being drilled, he informed Mr. Stanley, the mine foreman, that this would be one of the violations issued that day. Stanley reportedly said that he did not have the proper steel to drill the bore holes on hand so he said he would stop number 5 and 6 headings until the bore holes were drilled. The inspector thereupon issued Citation No. 2463641 and made the termination due the following day, January 25, 1985.

With regard to that citation, he marked negligence as "moderate" because this was the first time he had cited an

his area. For these reasons, the inspector also determined hat this violation was a "significant and substantial" one.

On January 29, 1985, Inspector Slone returned to the ine. When he determined that coal was being mined with a ontinuous miner in both number 5 and 6 entries without the ore holes being drilled, he issued section 104(b) Order No. 463648 for failure to comply with the previously issued ection 104(a) citation in that the bore holes still hadn't een driven and the time for abatement had elapsed. Subsequently, bore holes were drilled and the section 104(b) rder was terminated.

The Secretary contends that this operator has a medium-ize operation and I note from the company's violation history report for the two (2) years prior to this violation hat it had a relatively unremarkable violation history.

Respondent's Failure to Appear at the Hearing

The record in this case indicates that a Notice of earing dated June 26, 1986, setting this case down for earing in Prestonsburg, Kentucky, on August 7, 1986, was eceived by the respondent on July 3, 1986. The postal ervice certified mail return receipt card was signed by onja Darlington. Further, a Notice of Hearing Site dated uly 30, 1986, was received by the respondent on August 1, 986. The green return receipt card was signed by Rhonda arlington.

When the respondent failed to appear at the appointed ime and place, the hearing proceeded in his absence. On ugust 25, 1986, pursuant to Commission Rules, 29 C.F.R. 2700.63, I issued an Order to Show Cause to the respondent o show cause as to why it should not be defaulted for its ailure to appear at the hearing. The respondent replied by

/ The term "blackdamp" is defined in the Bureau of Mines, . S. Department of Interior, A Dictionary of Mining, Mineral nd Related Terms (1968) at 108:

> Generally applied to carbon dioxide. Strictly speaking a mixture of nitrogen and carbon dioxide. The average blackdamp contains 10 to 15 percent carbon dioxide and 85 to 90 percent nitrogen.... An atmosphere depleted of oxygen rather than containing an excess of carbon

Mr. Roy J. Maurer:

The reason I was unable to attend Docket No. Kent 85-101 case on August 7, 1986 was because legal problems that I had to take care of at my other mines in Boon County, W.Va.
This was all unexpected and I was not able to get in contact with anyone to ask for a delay.
Thank you,

/Signature/
Glenn H. Trent Jr.
President

This is a totally unsatisfactory showing of good cause for failing to appear at the hearing, or sending someone else to represent the corporation, or at least giving some notice of inability to appear to either myself or counsel for the petitioner. Under the circumstances, I conclude and find that respondent has waived his right to be heard further in this matter and that he is in default.

Fact of Violation

I conclude and find that the petitioner has established a violation of 30 C.F.R. § 75.1701 by a preponderance of the evidence. The testimony of Inspector Slone fully supports the citation which he issued and it IS AFFIRMED. Furthermore, I conclude and find that the violation is significant and substantial and the inspector's finding in this regard is likewise AFFIRMED.

Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the proposed civil penalty assessment of $420 is appropriate in this case.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $420 within thirty (30) days of the date of this decision, and upon receipt of that payment by MSHA, these

of Labor, 801 Broadway, Rm. 260, Nashville, TN 37203
tified Mail)

n H. Trent, Jr., TAC & C Energy, Inc., Box 237, Gilbert,
25621 (Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 86-111 A.C. No. 15-12672-03504
v.	:	
	:	River Dredge
RIVCO DREDGING CORPORATION, Respondent	:	

DECISION APPROVING SETTLEMENT

Appearances: Mary K. Spencer, Esq., Office of the Solicit
U.S. Department of Labor, Arlington, Virgini
for Petitioner;
Mr. Gene A. Wilson, President, Rivco Dredgi
Corporation, Louisa, Kentucky, for Responde

Before: Judge Melick

This case is before me upon a petition for assessment civil penalty under Section 105(d) of the Federal Mine Safe and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. A reduction in penalty from $92 to $40 is proposed. have considered the representations and documentation submitted in this case, and I conclude that the proffered sett ment is appropriate under the criteria set forth in Sectio 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty o $40 within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

Mary K. Spencer, Esq., Office of the Solicitor, U.S. Depar ment of Labor, 4015 Wilson Blvd., Room 1237A, Arlington, V

SEP 30 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-27 A.C. No. 11-00611-03524
v.	:	Fidelity Strip Mine
FREEMAN UNITED COAL MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On September 29, 1986, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $1000 and the parties propose to settle for $475.

The case involves a single citation charging a violatic of 30 C.F.R. § 77.1607(c) because scrapers were not being op at prudent speeds resulting in a head-on collision and a serious injury. The motion states that the violation was serious but did not result from Respondent's negligence. It was caused by a scraper operator violating Respondent's published safety rules and passing a water truck when visibility was diminished because of road dust. (The water truck was keeping the road wet to allay the dust.) Respond is a large operator and has a favorable history of prior violations. I have considered the motion in the light of the criteria in section 110(i) of the Act and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $475 within 30 days of the dat of this order.

James A Broderick

James A. Broderick
Administrative Law Jud

60604 (Certified Mail)

ry M. Coven, Esq., Gould & Ratner, 300 W. Washington St.,
te 1500, Chicago, IL 60606 (Certified Mail)

SEP 30 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 85-288 A. C. No. 36-00921-03528
v.	:	Penn Hill Mine
STANFORD MINING COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Maurer

On September 29, 1986, the Solicitor filed a stipulatic and motion to approve settlement agreement in the above-captioned case. At issue are two section 104(a) citations originally assessed at $10,000 each. Settlement is proposec at $6,600 per violation.

Citation No. 2403809 was issued for a violation of 30 C.F.R. § 75.200 in conjunction with Order of Withdrawal No. 2403808 issued pursuant to section 107(a) when following a fatal roof fall investigation, it was determined that the roof of the active No. 4 entry of the 6 right 006 section had not been properly supported prior to continuing mining. The accident resulted in the death of section foreman Ernest E. Nichol as he attempted to install a roof bolt in this section. The accident investigation revealed that the No. 4 entry in violation of the mine's approved roof contro plan had been mined approximately 12 feet inby the permanen roof supports and mining continued in the 1st open crosscut between the No. 3 and 4 entries holing and cutting back into the No. 4 entry. This resulted in an unsupported intersection approximately 30 feet long which condition led to the issuance of the imminent danger order, supra.

Citation No. 2403811 was issued in conjunction with 107(a) Order of Withdrawal No. 2403810 as a result of the same accident investigation. The investigation revealed that an imminent danger had been created when employees were proceeding inby permanent supports and the Automated

pressurized unless crib blocks or other suitable blocking material are used. The accident investigation disclosed that the victim had proceeded inby the permanent supports to manually adjust roof mats, i.e., additional supports that were placed on the extreme left ring of the ATRS. To enable the victim to adjust the mat, the ATRS was depressurized, resulting in the roof fall and fatality.

The inspector determined that the violations were caused by the high negligence of the operator resulting in a fatal occurrence. The operator showed ordinary good faith in abating these practices.

The Solicitor further asserts that the operator is currently in an impaired financial condition and that there would be an adverse impact on the operator's ability to remain in business if the proposed assessment were imposed on it. For example, in fiscal year 1985, the last for which totals are available, the operator suffered a net loss of $1,313,723.

The Solicitor represents that the proposed assessment, as amended, is still a substantial penalty and reflects due consideration of the gravity of the violations and the operator's negligence.

I accept the Solicitor's representations and approve the settlement.

ORDER

The operator is ordered to pay $13,200 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

David T. Bush, Esq., Office of the Solicitor, U. S. Department of Labor, 3535 Market St., Philadelphia, PA 19104 (Certifi

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 84-103-M A.C. No. 04-00030-05502
v.	:	Brubaker-Mann
BRUBAKER-MANN INCORPORATED, Respondent	:	

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicit
U.S. Department of Labor, Los Angeles, Calif
for Petitioner;
Steve Pell, Esq., Ventura, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety
Health Administration, (MSHA), charges respondent with vio
safety regulations promulgated under the Federal Mine Safe
Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits c
menced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled con
to respondent's contentions in WEST 84-96-M

Stipulation

The parties stipulated that respondent is a small ope
Further, respondent is subject to the Act unless MSHA's ju
diction is pre-empted by the California Occupational Safet
Health Administration (Tr. 191, 249).

Citation 2246284

MSHA inspector Ronald Ainge, a person experienced in
issued this citation January 18, 1984 when he observed a v
lation of 30 C.F.R. § 56.14-3 (Tr. 16, 17, 22-26, 132-133,
138-141; Ex. P1, P2, P3).

There was a possibility that a man could contact the
drive behind this waist high guard particularly while lubr
or cleaning the equipment (Tr. 20, 21, 88, 90). The inspe
did not observe anyone lubricating the machine while it wa
operating (Tr. 93).

The handrail and the chain drive are approximately 40
inches high (Tr. 263, 264).

There is a possibility that a person could accidental
reach behind the machine although it is guarded in front a
the top (Tr. 88, 89). An employee could gain access by re
behind the guard and contacting the pinch point (Tr. 21).

By way of abatement the inspector required that the c
drive be enclosed from the back (Tr. 29).

Mr. Mann testified this machine has been in operation
between 25 and 30 years (Tr. 231). Further, the guards ha
previously approved by MSHA and Cal-OSHA inspectors (Tr. 2
The machine had a guard on the front and the top (Tr. 231)
Further, no one would service this machine while it is ope
(Tr. 231).

Evaluation of the Evidence

The evidence establishes that the chain drive was gua
However, the inspector concluded that a worker could accid
reach behind the guard and contact the pinch points.

The photographs do not support MSHA's theory that a
violation existed here (Exhibits P1, P2, and P3). The pul
guarded on the walkway side and a guard encircled the equi
The conveyor itself blocked access to the unguarded side c
pulley. These factors cause me to conclude that no person
accidentally reach behind the guard and become caught betw
belt and the pulley.

Inspector Ainge issued this citation because he observed at the chain drive was entirely exposed. It was about four e half feet off of the ground, close to a walkway and easil cessible (Tr. 30, 31; Ex. P4).

A person cleaning or lubricating this equipment could ntact the chain drive and incur an amputation (Tr. 31).

There were workers moving throughout the plant and they uld be in area as needed (Tr. 32). In the inspector's opin e company would service the equipment while it was running). Except for lunchtime he had never noticed a shutdown of uipment which was conveying material.

An injury was reasonably likely to happen due to this ndition (Tr. 33).

Mr. Tafoya, the company's respresentative, told the spector that they had taken the old guard off to change the lleys. After the change, the old guard would no longer fit r. 33, 94).

In abating the condition it was suggested that a guard c e drive chain (Tr. 34).

Witness Mann, who testified for the company, indicated t chine is in a very remote area. In addition, there was a mporary cover over it, but he was not familiar with it (Tr. 5).

At the time of the inspection the machine was in the pro being tested and repaired (Tr. 232).

Evaluation of the Evidence

In connection with this citation I credit the inspector' stimony. He observed the violation over a period of time. stimony is further confirmed by the statement of respondent presentative Tafoya. There was no indication the machinery ng tested and the inspector did not observe a shutdown of uipment.

Since the chain guard was unguarded, Citation 2246286 sh affirmed.

This citation charges respondent with violating 30 C.F.R. 56.14-1 which provides as follows:

> 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed mov machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

Summary of the Evidence

Inspector Ainge also issued this citation as a non-signif nt and substantial violation because the counter balance whe the simon shaker [1]/ was unguarded (Tr. 35, 99).

The shaker generates considerable dust. A guard on the chine would preclude a possible broken bone (Tr. 100).

Mr. Mann testified this machine had been inspected for ab years. No one had required a guard on the back of the coun lance. Such a guard would not enhance the safety of the chine.

In addition, no one would service the machine while it is erating (Tr. 232, 233, 267).

Evaluation of the Evidence

Inspector Ainge testified as to facts that establish a olation of the regulation.

Mr. Mann does not deny that the condition exists but he serts no guard had been required on the machine for 20 years wever, the mere fact a guard had not previously required doe t constitute a defense. Further, I credit the inspector's pertise on whether a guard would enhance the safety of this chine.

Citation 2246287 should be affirmed.

Citation 2246289

This citation charges respondent with violating 30 C.F.R. 56.14-3 cited, supra.

stem above the three-eighths inch rock hopper. The drive we
om a motor to a head pulley (Tr. 40, 41; Ex. P7, P8, P9, P10
e head pulley did not have a back on it and it was also un-
arded. The area had to be serviced and lubricated. A man
uld reach behind the guard and contact the pinch points betw
e drive chain and the sprockets (Tr. 40, 43).

On the day of the inspection the inspector saw employees
e area. The employees would have to go behind the head pull
d down the other side to have access to other parts of the
ant (Tr. 43).

At any time during cleanup or lubrication these areas wou
accessible (Tr. 44). The plant operated the entire time,
cept during lunch or a breakdown (Tr. 45).

Abatement was achieved by placing a backguard on the chai
ive and the tail pulley was enclosed with more screening
terial so as to restrict access (Tr. 45).

Mr. Mann indicated this machine had been inspected many
mes in the last 20 to 25 years (Tr. 235). Prior to the
spection the machine had a back guard. But such a guard ser
purpose nor does it make the machine any safer (Tr. 235-237
e top of the conveyor was about 36 inches above the ground (
5, 276). The pinch point was not accessible because a perso
uld have to go around the guard (Tr. 274, 275; Ex. P10).

Evaluation of the Evidence

The head pulley in this citation was unguarded. The fact
tuation accordingly differs from that in Citation 2246284,
ora.

I further credit inspector Ainge's testimony as to the
olation. Exhibit P10 particularly shows the ready access a
rker would have to this hazard.

Citation 2246289 should be affirmed.

Citation 2246292

This citation charges respondent with violating 30 C.F.R.
56.9-7 which provides as follows:

re was no guarding or emergency stop cords to stop the
r (Tr. 49, 111, 112, 135; Ex. P13, P14)..

e hazard here involved the possibility of a maintenance
ng pulled into the conveyor system due to the absence of
g or stop cords (Tr. 50; Ex. P13, P14).

ere were people working in the area on the day of the
ion (Tr. 50).

e conveyor, according to Mr. Tafoya, had been in operation
ear. The inspector believed it was highly likely that an
t could occur (Tr. 52, 53, 114).

. Mann stated that they were testing a stream of the rock
conveyor. They had worked on this equipment for over two
whenever the weather was bad, or the rock was wet, or in
jobs (Tr. 239, 242). The only people in the area would
e working on it (Tr. 240).

Evaluation of the Evidence

credit inspector Ainge's testimony in connection with this
n.

is clear that the conveyors were unguarded and not
d with stop cords. Mr. Mann's testimony indicates that
re testing a stream of rock. I accept his explanation but
ration of the conveyor even in that manner would not
the use of stop cords.

tation 2246292 should be affirmed.

Citation 2246293

is citation charges respondent with violating 30 C.F.R.
-1, cited supra.

Summary of the Evidence

the same conveyor system as previously cited, the head
was unguarded and accessible from both sides. There were
ls on the outer side but no guarding on the inside (Tr.
Ex. P15, 16).

2).

Evaluation of the Evidence

I credit Inspector Ainge's testimony.

Mr. Mann's testimony is not persuasive. A conveyor is in eration although it is merely running a stream of rock for sting purposes. Further, the photographs show that the head lley was unguarded (Ex. P15, P16).

The citation should be affirmed.

Civil Penalties

The statutory mandate to access civil penalties is contain section 110(i) of the Act, now codified at 30 U.S.C. § 820(i ncerning prior history: the computer printout (Ex. P34) shows at respondent had no violations in the two year period ending rch 5, 1985. The printout shows two violations before March 83. But, as the respondent contends, these would appear to b e two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC 227 980). Accordingly, I conclude that the Secretary has failed ove any adverse history on the part of respondent. The parti ve stipulated that the operator is a small company. The nalties appear appropriate in relation to the small operator d they should not affect the ability of the company to contin business. Concerning the negligence of the operator: the olations that are affirmed all involve the failure to provide ards or related safety devices. These conditions were open a vious hence the operator must be considered to be negligent. e gravity for the violations is high since an amputation or tality could result from these conditions. The operator is edited with good faith since the company abated the violative nditions.

The penalties proposed by the Secretary are as follows:

2246284	to be vacated
2246286	$ 63
2246287	20
2246289	46
2246292	100
2246293	63

1. The Commission has jurisdiction to decide this case.

2. Citation 2246284 should be vacated.

3. The following citations should be affirmed:

2246286
2246287
2246289
2246292
2246293

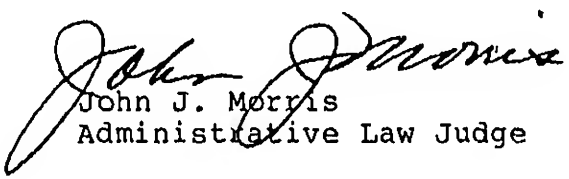
Based on the foregoing findings of fact and conclusions of
w I enter the following:

ORDER

1. Citation 2246284 and all penalties therefor are vacate

2. The following citations are affirmed and the penalties
noted thereafter are assessed:

Citation	Penalty
2246286	$52
2246287	15
2246289	36
2246292	50
2246293	42



John J. Morris
Administrative Law Judge

stribution:

chelle Ramsey, Esq., Office of the Solicitor, U.S. Department
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CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 85-177-M
Petitioner	:	A.C. No. 04-00030-05504
	:	
v.		
	:	Brubaker-Mann
UBAKER-MANN, INC.,	:	
Respondent	:	

DECISION

Appearances: Rochelle Ramsey, Esq.,, Office of the Solicitor, U.S. Department of Labor, Los Angeles, California for Petitioner;
Steve Pell, Esq., Ventura, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violatin safety regulation promulgated under the Federal Mine Safety a Health Act, 30 U.S.C. § 802 et seq., (the Act).

After notice to the parties a hearing on the merits com-nced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrary respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operator rther, respondent is subject to the Act unless MSHA's juris-ction is pre-empted by the California Occupational Safety and alth Administration (Tr. 191, 249).

Citation 2364577

This citation charges respondent with violating 30 C.F.R. 56.9087 which provides as follows:

Summary of the Evidence

MSHA inspector Ronald Ainge issued this citation becaus front-end loader, which was operating on the day of the in- spection, did not have a functioning reverse alarm signal (T 56, 119). There was a mill operator and a welder in the are no spotter was available to tell the equipment driver when i clear to back up (Tr. 56, 57, 120). The inspector was in th area for two days and he observed no person signaling the lo operator (Tr. 120, 121).

Mr. Mann testified that the Caterpillar was equipped wi reverse signal alarm (Tr. 242, 243, 282). However, the alar causing the men mental stress so they turned it down so it c not be heard (Tr. 243, 283). Also there is supposed to be a spotter in the area. No accidents have occurred from this c dition (Tr. 243, 284). In addition, this equipment operates noisy part of the plant (Tr. 283).

Evaluation of the Evidence

The inspector's testimony establishes a violation of th regulation. Mr. Mann's evidence fails to establish a defens The fact that the workmen turned off the reverse alarm only contributed to the possibility of an accident or fatality.

Citation 2364577 should be affirmed.

Civil Penalty

The statutory mandate to assess civil penalties is cont in section 110(i) of the Act, now codified 30 U.S.C. § 820(i Concerning prior history: the computer printout (Ex. P34) sh that respondent had no violations in the two year period end March 5, 1985. The printout shows two violations before Mar 1983. But, as the respondent contends, these would appear t the two citations vacated in Brubaker-Mann, 2 FMSHRC 227 (19 Accordingly, I conclude that the Secretary has failed to pro any adverse history on the part of respondent. The parties stipulated that the operator is a small company. The penalt appears appropriate in relation to a small operator and it s not affect the ability of the company to continue in busines Concerning the negligence of the operator: this citation inv a failure to use a back-up alarm. This condition was obviou

the narrative portion of this decision, the following conclus
of law are entered:

1. The Commission has jurisdiction to decide this case.

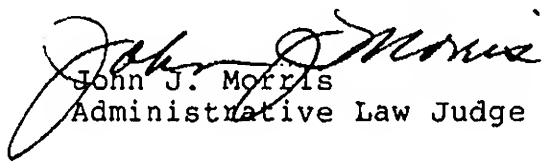
2. Citation 2364577 should be affirmed and a penalty of
should be assessed.

Based on the foregoing findings of fact and conclusions
law I enter the following:

ORDER

1. Citation 2364577 is affirmed.

2. A civil penalty of $59 is assessed.



John J. Morris
Administrative Law Judge

Distribution:

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Steve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA
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/bls

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-82-M A.C. No. 04-00030-05505
v.	:	Brubaker-Mann
BRUBAKER-MANN, INC., Respondent	:	

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, Californi for Petitioner;
Steve Pell, Esq., Ventura, California, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent with violati safety regulations promulgated under the Federal Mine Safety a Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contrar to respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small operato Further, respondent is subject to the Act unless MSHA's juris- diction is pre-empted by the California Occupational Safety an Health Administration (Tr. 191, 249).

Citation 2669970

scrapers); as used in metal and non-metal mining operation with or without attachments, shall be used such mining onl when equipped with (1) roll-over protective structures (ROPS) in accordance with the requirements of paragraphs (through (g) of this standard, as applicable, and (2) seat belts meeting the requirements of the Society of Automotiv Engineers (SAE), Motor Vehicle Seat Belts Assemblies-SAE J4v, approved November 1955, revised July 1965; Seat Belt Hardware Test Procedures-SAE J140a, approved April 1970, r vised February 1973; Seat Belt Hardware Performance Requir ments-SAE J141; Operator Protection for Wheel Type Agri- cultural and Industrial Tractors-SAE J333a, approved April 1968; revised July 1970, conforms to ASAE S305; and Seat Belts for Construction Equipment-SAE J386 approved March 1968; and, in accordance with paragraphs (b), (c), and (e) of this standard, as applicable.

Summary of the Evidence

MSHA inspector Ronald Barri issued this citation when he s driver climb out of a small Michigan front-end loader that wa t equipped with seat belts (Tr. 151, 153). At the time the s seven foot high loader was parked in front of the hopper at e crusher (Tr. 151, 153).

The lack of seat belts could cause the operator to be thro om this equipment (Tr. 152). The inspector further considere reasonably likely that this type of equipment would roll ove r. 152).

William Mann testified that the company had been informed at seat belts must be on the equipment but they do not have t worn (Tr. 209).

Further, the vehicles involved in this citation and the llowing citation operate on a level slab (Tr. 209). But they st otherwise transverse grades of eight to ten percent in the ea (Tr. 285).

Evaluation of the Evidence

The MSHA's inspector's testimony establishes a violation o e regulation.

Mr. Mann in his testimony asserts that the seat belts must

This citation was issued by MSHA inspector Barri when observed that half of the seat belt in the 988 Caterpillar front-end loader was missing (Tr. 154).

The inspector observed the operator get out of the ec (Tr. 154).

In the event of a rollover the operator could be thro the equipment and possibly crushed (Tr. 155).

Evaluation of the Evidence

The evidence establishes a violation of the regulatio

A portion of a seat belt is not in compliance with th regulation. The citation should be affirmed.

Citation 2669972

This citation charges respondent with violating 30 C § 56.14007 which provides as follows:

§ 56.14007 Construction and maintenance.

Guards shall be of substantial construction and prope maintained.

Summary of the Evidence

This citation was issued when the MSHA inspector obse 8 by 10 inch opening in the top screen of a V-belt drive. top of the screen was 18 to 24 inches from the ground (Tr 156-159; Ex. P17).

The hazard involved someone inadvertently getting the into the drive from the adjacent walkway (Tr. 158, 206). exposure could cut or amputate a finger, hand or arm (Tr.

In order to gain access to this area a worker would h bend over but he would not have to get on his hands and kn (Tr. 205).

Evaluation of the Evidence

The evidence indicates the guard, with an eight by te

Safe means of access shall be provided and maintained to all working places.

Summary of the Evidence

A section of mat, eight inches wide and ten feet long, w ssing on the outside edge of the landing along a walkway ad cent to a conveyor (Tr. 163, 164).

Someone could step in this open hole and incur scratches cerations or a possible groin injury (Tr. 164, 166, Ex. P19).

Witness Mann testified that this seldom used, almost solete non-working area, was in the older part of the plant . 216, 288). There is an area to the left of that shown i photographs where people walk (Tr. 216, 217; Ex. P19, P20 would have to walk around bars and sections to walk on th ea with the 10 foot missing section (Tr. 217). This area w completely blocked off (Tr. 289). Employees have strict ructions not to enter any of the remote parts of the plant). But no area of the plant was signed to prohibit entry).

Evaluation of the Evidence

The facts establish a violation of the regulation. loyees had access to the violative condition.

The defenses raised by Mr. Mann relate to the imposition ivil penalty. Minimal access and instructions not to ente ote areas relate to gravity and negligence. The proposed il penalty should be substantially reduced.

Citation 2669975

This citation charges respondent with violating 30 C.F.R 6.11002 which provides as follows:

§ 56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stair ways shall be of substantial construction provided with handrails, and maintained in good condition. Where nece sary, toeboards shall be provided.

(Tr. 166, 167, 170; Ex. P21, P22, P23).

If the wire or belting broke a person could fall 20 fee the ground (Tr. 168). Such a hazard could cause a fatality serious injury (Tr. 169, 170). The likelihood of an injury reasonably likely (Tr. 170).

Witness Mann testified that no one has to go to this dead-end area of the plant except to repair a malfunction. that occurred the plant would not be operating (Tr. 219, 220 Federal inspectors previously told the company to put a chai across this area (Tr. 219). After the company put a chain across, it was cited (Tr. 219).

Evaluation of the Evidence

The facts establish a violation of the regulation. The hazard of the situation was somewhat increased by the substitution of chain and belting in lieu of a substantial handrail.

Mr. Mann's testimony goes to the company's negligence, item to be considered in assessing a civil penalty. The cit should be affirmed.

Citation 2669977

This citation charges respondent with violating 30 C.F. § 56.14001, which provides as follows:

§ 56.14001 Moving machine parts.

Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan i lets; and similar exposed moving machine parts which ma be contacted by persons, and which may cause injury to persons, shall be guarded.

Summary of the Evidence

MSHA inspector Ronald Barri observed that the head pull the trumble conveyor lacked a guard. The pinch point was si inches from the walkway and 12 inches above it (Tr. 173, 174 177; Ex. P25). There was a handrail alongside the walkway 198). A person cleaning the equipment or lubricating it cou

Mr. Mann testified that no injuries had ever occurred wi this machine. Further, before abatement, it had been in the condition for 33 years (Tr. 223). Any injury would have to b deliberate (Tr. 224).

Evaluation of the Evidence

The evidence, supported by the photographs, establish th moving machine parts could be contacted by workers.

Mr. Mann's testimony is not persuasive. The fact that n injury has ever occurred is most fortunate. But the purpose such a safety regulation is to prevent the first accident.

The citation should be affirmed.

Citation 2669978

This citation alleges a violation of 30 C.F.R. § 56.1400 cited, supra.

Summary of the Evidence

The MSHA inspector testified that the oversized conveyor lacked a guard for the tail pulley (Tr. 179; Ex. P28).

If a person contacted the pinch point, which was 18 to 2 inches from the walkway, he could be pulled into it (Tr. 180- This could occur during cleanup, maintenance or lubrication (180-182). Employees use this walkway (Tr. 182).

The hazard here could cause injury to an arm (Tr. 182).

The company abated by installing an expanded metal guard (Tr. 183, 184; Ex. P29), although the tail pulley had structu steel around it (Tr. 196). To gain access to the area a pers would have to get down on his hands and knees (Tr. 196).

Mr. Mann indicated the tail pulley was located below a stairway (Tr. 224). It would be difficult as get close to th pinch points; in effect, it would require a deliberate act (T 224, 225). It is not reasonably likely that someone could be injured in this area (Tr. 225).

Citation 2669978 should be vacated.

Citation 2669979

This citation charges respondent with violating 30 C.F.R. § 56.12032 which provides as follows:

§ 56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Summary of the Evidence

The inspector observed that the junction box cover was missing from the drive motor on the number 3 conveyor (Tr. 184 Ex. P30).

The company abated by installing a cover (Tr. 185, 290; E P31).

The absence of a cover could result in a short. The inspector believed that it was reasonably likely that this cou occur. However, there was a "slim to no" chance of a resultin electrocution from touching the frame of conveyor (Tr. 186, 19 The equipment was grounded (Tr. 194).

Mr. Mann indicated an electrician was in the process of repairing this condition. He had returned to town for parts (226). According to the company's electrician the condition proposed no danger to anyone (Tr. 226).

Evaluation of the Evidence

The testimony and the photograph establish that a violati occurred. Mr. Mann's testimony relates to the imposition of a penalty. The citation should be affirmed but the penalty substantially reduced.

Civil Penalties

The statutory mandate to access civil penalties is contai in section 110(i) of the Act, now codified at 30 U.S.C. § 820(

e negligence of the operator. All of the citations that are
firmed involve open and obvious conditions that should have
en known to the operator. The negligence of the operator i
tablished. Concerning gravity: In Citations 21669970 and
69971 (missing seat belts) a severe injury or fatality coul
cur. In Citation 2669972 (unguarded V belt) an amputation
uld occur. In Citation 2669974 (outside edge of landing ma
ssing) the gravity of the violation is considerably over-
timated. Only a small strip of the mat was missing. In
tation 2669975 (wire and belting instead of handrail) the
fenses raised by Mr. Mann minimize the gravity. In Citatic
69977 (unguarded head pulley) the condition could cause a
rious injury. In Citation 2669979 (cover plate) the gravit
ry minimal in view of the fact that the system was grounded
e operator is credited with statutory good faith since the
mpany abated the violative conditions.

The Secretary's proposed penalties are set forth below.
lance, I consider the penalties assessed hereafter to be pr
view of all of the statutory criteria.

Citation No.	Proposed Assessment	Assessed
2669970	$ 91	$70
2669971	91	70
2669972	91	80
2669974	68	10
2669975	91	30
2669977	91	80
2669978	91	vacated
2669979	112	10

Conclusions of Law

Based on the entire record and the factual findings made
e narrative portion of this decision, the following conclus
law are entered:

1. The Commission has jurisdiction to decide this case.

2. Citation 2669978 should be vacated.

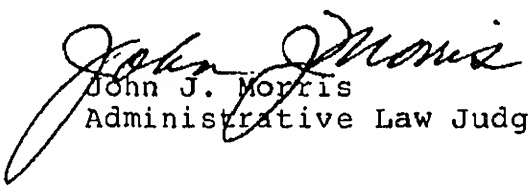
3. The remaining citations should be affirmed and penal
sessed.

Based on the foregoing findings of fact and conclusions

ssessed as noted:

Citation No.	Penalty
2669970	$70
2669971	70
2669972	80
2669974	10
2669975	30
2669977	80
2669979	10

2. Citation No. 2669978 and all penalties therefor are
icated.



John J. Morris
Administrative Law Judge

istribution:

ochelle Ramsey, Esq., Office of the Solicitor, U.S. Departme
f Labor, 3247 Federal Building, 300 North Los Angeles Street
os Angeles, CA 90012 (Certified Mail)

teve Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA
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ols

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

SE

ECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 86-94-M
Petitioner	:	A.C. No. 04-00030-05506
	:	
v.	:	Brubaker-Mann
	:	
RUBAKER-MANN INCORPORATED,	:	
Respondent	:	

DECISION

ppearances: Rochelle Ramsey, Esq., Office of the Solicitor
U.S. Department of Labor, Los Angeles, Califor
for Petitioner;
Steve Pell, Esq., Ventura, California,
for Respondent.

efore: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety ar
ealth Administration, (MSHA), charges respondent with viola
afety regulations promulgated under the Federal Mine Safety
ealth Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits
ommenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

Certain threshold issues were discussed and ruled contr
respondent's contentions in WEST 84-96-M.

Stipulation

The parties stipulated that respondent is a small opera
rther, respondent is subject to the Act unless MSHA's juri

If someone fell it would not result in a serious injur
162).

Witness Mann indicated that no one goes to this area w
is wet (Tr. 212). A worker would not be in the area unless
was lubricating the conveyor and then it would be shut down
213). In addition, witness Mann indicated the area was blo
off (Tr. 213).

Mr. Mann also stated that the area cited was located a
top and at the extreme end of the plant. No one would have
occasion to be there except to clean up or lube the equipme
(Tr. 287).

Evaluation of the Evidence

I find the inspector's testimony to be credible. Mr.
concedes a worker would be in the area if he was maintainin
equipment. Such minimal use exposes that worker to the vio
condition.

The citation should be affirmed.

Citation 2669976

This citation charges respondent with violating 30 C.F
§ 56.20003(a), cited supra.

Summary of the Evidence

This citation resulted from a spill of fine material
approximately 18 inches deep along the walkway on top of th
super doles storage tank (Tr. 171). This created a slippin
tripping hazard but injuries would be minimal (Tr. 173).

The area, after abatement, was photographed (Tr. 172,
P24). The desert, where this plant is located, by its very
environment, causes a buildup of dust and sand (Tr. 200).
the inspector believed the buildup was caused by a leak in
conveyor because it was the same material that was in the b
(Tr. 202).

Mr. Mann indicated the fines are a continual buildup a
they clean it continually. No one would be on top of the t

Citation 2669980

This citation charges respondent with violating 30 C.F
56.14001 which provides as follows:

§ 56.14001 Moving machine parts.
Gears, sprockets; chains; drive, head, tail, and takeu
pulleys; flywheels; couplings; shafts; sawblades; fan
inlets; and similar exposed moving machine parts which
be contacted by persons, and which may cause injury to
persons, shall be guarded.

Summary of the Evidence

There was no guard on the tail pulley of the two-inch
onveyor to prevent a person from contacting a pinch point
87; Ex. P32).

Employees have access to this area and a person could
aught and pulled into the tail pulley. A serious injury c
esult (Tr. 188, 189).

A workman could be injured in cleaning, lubricating or
aintaining equipment in the area (Tr. 189).

The unguarded pinch point was 10 to 12 inches above an
o 20 inches from the walkway (Tr. 189).

The company installed a guard preventing access to the
oint (Tr. 190; Ex. P33). In cross-examination the inspect
greed that the machine in question was under a stairway.
urther, a person would have to squat and reach in to gain
o the pinch points (Tr. 194).

Mr. Mann indicated that previous MSHA inspectors had n
ited the company for this condition (Tr. 222; Ex. R1).

Evaluation of the Evidence

The inspector agreed that the violative condition was
stairway. In addition, a person would have to squat and
n to gain access to the pinch points. The evidence causes
onclude that this condition did not involve exposed moving
achine parts which could be contacted by a workman.

the two citations vacated in Brubaker-Mann, Inc., 2 FMSHRC (1980). Accordingly, I conclude that the Secretary has fa prove any adverse history on the part of respondent. The have stipulated that the operator is a small company. The posed penalties of $20 each for the housekeeping violation appear appropriate in relation to the size of the operator they should not affect the ability of the company to conti business particularly considering its annual approximate g income of $1,000,000 (Tr. 301). Concerning the negligence operator: the housekeeping conditions were obvious and inv substantial buildup. The operator must be considered to b negligent. The gravity, as noted by the inspector, is min. The operator is credited with statutory good faith since t violative conditions were rapidly abated.

On balance, I consider that a civil penalty of $10 is appropriate for each of the housekeeping violations.

Conclusions of Law

Based on the entire record and the factual findings m the narrative portion of this decision, the following conc of law are entered:

1. The Commission has jurisdiction to decide this ca

2. Respondent violated 30 C.F.R. § 56.20003(a) in tw stances as alleged in Citations 2669973 and 2669976.

3. Respondent did not violate 30 C.F.R. § 56.14001 a alleged in Citation 2669980.

Based on the foregoing findings of fact and conclusio law I enter the following:

ORDER

1. Citation 2669973 is affirmed and a penalty of $10 assessed.

2. Citation 2669976 is affirmed and a penalty of $10 assessed.

3. Citation 2669980 and all penalties therefor are v

e Pell, Esq., 3200 Telegraph Road, Suite 207, Ventura, CA 9
tified Mail)

ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 84-96-M A.C. No. 04-00030-05501
v.	:	Brubaker-Mann
BRUBAKER-MANN INCORPORATED, Respondent	:	

DECISION

Appearances: Rochelle Ramsey, Esq., Office of the Solici
U.S. Department of Labor, Los Angeles, Cali
for Petitioner;
Steve Pell, Esq., Ventura, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety Health Administration, (MSHA), charges respondent with vi two safety regulations promulgated under the Federal Mine and Health Act, 30 U.S.C. § 801 et seq., (the Act).

After notice to the parties a hearing on the merits commenced in Los Angeles, California on June 11, 1986.

The parties filed post-trial briefs.

Issues

The issues are whether the Secretary's acts in issui citations exceed the powers legislated by Congress since State of California has a mine safety program equal or su to MSHA; further, whether the Secretary's conduct was arb and capricious in violation of the 5th Amendment; finally whether respondent has a right not to be inspected by MSH California has a viable mine safety program.

The above threshold issues and the contentions raise respondent require a review of certain uncontroverted evi witnesses Byron M. Ishkanian and William Mann.

Bryon M. Ishkanian, testifying by deposition, identi himself as the principal engineer for mining and tunnelli

e. It is one of 904 mining locations within California (D. 13, 14). Inspections by California encompass mechanical ding of head and tail pulleys, explosives, reverse alarms, belts and junction boxes on 220 volt drive motors (D. 10). orkers were exposed as alleged in the MSHA citations fornia could have issued citations (D. 13, 14).

Before 1977 there were no MSHA inspections and the State wa sole inspecting authority in California (D. 16).

The State has assisted in training MSHA and MESA in- tors. MESA also adopted some of California's regulations 16, 17). MSHA's regulations are more general than fornia's and the MSHA inspector has a greater degree of retion (D. 18).

Mr. Ishkanian has no jurisdiction over MSHA but he has ived numerous complaints about the dual enforcement presence he State (D. 20-22). An additional complaint is the lack of inuity in inspections because MSHA rotates its inspectors (D

The efforts at mine safety by the state of California and are duplicative (D. 13, 14).

The witness discussed duplicate efforts with federal cials William C. Frohan, Tom Shepuk and Ray Bernard (D. 28, But their response was negative (D 29). The witness had n t in the drafting of the Federal Act (D. 35, 36).

Norton Pickett, of the State of Nevada, has a job similar t of the witness. Pickett has also complained about the ication of safety efforts in Nevada. Pickett has worked for slation in the U.S. Congress to correct this condition (D. 24).

Mr. Ishkanian can see no need for the duplicative efforts i fornia. MSHA's efforts could be better used elsewhere. ty-three or twenty-five states have mine safety programs but states do not (D. 27-32). Section 512(a) of the Federal Ac its purpose is to avoid duplication of effort (D. 31, 32).

The thrust of the federal act is towards mine safety. Titl the California Administrative Code (attached to deposition xhibit A) deals with mine safety (D. 36, 37).

been in operation for 36 years. The company has worked ha safety; in addition, there has never been a fatality or an night accident (Tr. 209, 210, 247).

The company's president also indicated that previous inspectors had not cited the company for the conditions no alleged in WEST 86-82-M and WEST 86-94-M (Tr. 227; Ex. R1) fact, the company relied on previous MSHA inspections in 1 1981, and 1982 when the company was found not to be in vio of the regulations (Tr. 293, 294; Ex. R1). MSHA inspects company two to four times a year (Tr. 213).

Mr. Mann stated that the inconsistent application of regulations and the duplication of efforts by MSHA and the of California are a hardship on business (Tr. 295, 297). has different inspectors coming to the mine but the state the same inspector (Tr. 298). MSHA inspectors seems unfam with milling (Tr. 299).

Generally, in relation to the machinery, Mr. Mann tes that the company's various machines are never maintained, cated or oiled while they are operating. In fact, the pla closed for maintenance from 3:30 p.m. to 5 p.m. daily as w from 7 a.m. to noon on Saturdays (Tr. 211). In the absenc major breakdown, maintenance takes place only when the pla shut down (Tr. 211). In any event, the company's workers not put their hands into the machinery (Tr. 211).

Respondent's initial contention centers on the propos that Congress intended that MSHA should not exercise juris in states having a mine safety and health program. In sup its argument respondent cites portions of the Act, namely U.S.C. § 801(g) and § 959.

Section 801(g), in part, provides as follows:

> (g) it is the purpose of this chapter (1) to establis terim mandatory health and safety standards and to di the Secretary of Health and Human Services and the Se of Labor to develop and promulgate improved mandatory or safety standards to protect the health and safety Nation's coal or other miners; ... (3) to cooperate w and provide assistance to, the States in the developm enforcement of effective State coal or other mine hea safety programs; and (4) to improve and expand, in co

(a) The Secretary shall make a study to determine the bes
manner to coordinate Federal and State activities in the
field of coal or other mine health and safety so as to
achieve (1) maximum health and safety protection for mine
(2) an avoidance of duplication of effort, (3) maximum ef
fectiveness, (4) a reduction of delay to a minimum, and (
most effective use of Federal inspectors.

Respondent contends the Secretary not only failed to make
s report 1/ but the evidence shows a duplication of effort b
HA and the State of California; it further shows a lack of
ordination of such mine safety activities, a lack of maximum
fectiveness and a lack of effective use of federal inspector

Respondent's contentions lack merit. There is no indicat
the federal Act that Congress intended MSHA to withdraw if
able state program existed. To "cooperate" with a state is
way legislatively equivalent to withdrawing MSHA's enforcem
tion.

The legislative history of the Act sets forth a view
rectly contrary to the position urged by respondent. The
levant legislative history states as follows:

Effect on State Laws

Under the Metal and Nonmetal Act States are encouraged to
develop and enforce their own State plans meeting Federal
requirements. Six States have State plans currently in
effect. These are Arizona, Colorado, North Carolina, New
Mexico, Utah, and Virginia. Under the Metal and Nonmetal
Act the Secretary delegates his authority to States with
proved plans to carry out his functions.
Because State plans are not funded under the Metal and No
metal Act, but are entirely self-supported, Federal funds
would not be removed from these plans with the repeal of
Metal and Nonmetal Act. As a result, these State plans
would be expected to continue in conjunction with Federal
enforcement under H.R. 4287. It would be a dual system
which encourages State participation while at the same ti
not relinquishing Federal enforcement. However, the Fede
law would supersede any State law in conflict with it.
State laws providing more stringent standards than exist
under the Federal law, however, would not be held in

lative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 1st Session, 381 (May, 1977).

Stark v. Wickard 64 S. Ct 559, 321 U.S. 288 (1944) relied on espondent, states a well established principle of law. But ondent's position is not supported by the terms of federal ate or its legislative history.

Respondent's argument that the Secretary was only to olish "interim" safety regulations is misdirected. The 1969 rovided that such "interim" regulations were to be in effect . superseded in whole or in part by improved mandatory health dards promulgated by the Secretary ... § 201(a), Public Law 73, 83 Stat 760.

Respondent's further argument centers on the view that many he citations in the instant cases involve conditions for respondent was not previously cited. Further, respondent cited for conditions that have existed for 20 years or more. ondent also relies on witness Ishkanian's testimony regardin requiring a generator to be moved (D. 22).

Respondent's arguments and its cited cases are not per- ive. The evidence (Ex. R1) clearly supports the view that ondent was not cited for a number of years for conditions fo it is now cited. This is a basic estoppel argument. rally, an operator's reliance on prior inspections and the of citations from such inspections does not estop the etary from issuing a citation at a subsequent inspection. ectors tend to have different expertise and it is certainly ible that one inspector may believe a violation existed but her may lack the expertise to make such a determination. On doctrine of estoppel see the Commission decision of King Knob Company, Inc., 3 FMSHRC 1417 (1981); also Midwest Minerals 3 FMSHRC 251 (1981); Missouri Gravel Co., 3 FMSHRC 1465 1); Servtex Materials Company, 5 FMSHRC 1359 (1983). In , the mere fact that a violative condition existed for 20 s is not a defense. The Tapo road incident described by ess Ishkanian is not relevant here. It involved a mine ator other than this respondent (D. 22). In addition, ess Ishkanian's testimony about the lack of MSHA enforcement exas and Oklahoma is not relevant here.

In sum, the Secretary does not have to justify enforcement eedings in other states to proceed with these penalty

This is a restatement of the first argument. Ev
the state program is adequate, the federal Act is not
construction respondent urges.

In Leis v. Flynt, 439 U.S. 438, 99 S.Ct 698 (197
respondent, the Court ruled that the asserted right o
state lawyer to appear pro hoc vice in an Ohio Court
among those interests protected by the due process cl
14th Amendment. The cited case is not controlling in
situation.

For the foregoing reasons respondent's threshold
are without merit and they are denied.

Stipulation

The parties stipulated that respondent is a smal
Further, respondent is subject to the Act unless MSHA
diction is pre-empted by the California Occupational
Health Administration (Tr. 191, 249).

Citation 2246288

This citation charges respondent with violating
§ 56.14-1 which provides as follows:

> 56.14-1 Mandatory. Gears; sprockets; chains;
> head, tail, and takeup pulleys; flywheels; co
> shafts; sawblades; fan inlets; and similar ex
> moving machine parts which may be contacted b
> and which may cause injury to persons, shall

Summary of the Evidence

Ronald G. Ainge, a person experienced in mining,
citation on January 18, 1984 (Tr. 15-17, 36, 67).

The inspector observed that the conveyor was in
Further, the head pulley and the tail pulley were ung
Both pulleys were accessible (Tr. 37, 40, 101, 108; E

If a worker came in contact he could be pulled i
pulley (Tr. 38).

In the inspector's opinion it was highly likely

Evaluation of the Evidence

This case presents a basic credibility conflict as to
nether the conveyor was in operation. In this regard I cred
ne testimony of William Mann. As the operator of the plant
hould know whether the conveyor was in use or whether they
reparing to test it.

While the inspector indicated the equipment was in use
oncedes that he was advised that it had been moved to this
ocation. The photographs support respondent's version since
hey failed to show any dust or rock on the equipment (Ex. P
6).

Since I conclude the conveyor was not in use, it follows
nat the exposed moving parts could not be contacted by any
orkers.

For the foregoing reasons, citation 2246288 and all
enalties therefor should be vacated.

Citation 2246291

This citation charges respondent with violating 30 C.F.
56.20-3(a) which provides as follows:

> 56.20-3 Mandatory. At all mining operations; (a) Wo
> places, passageways, storerooms, and service rooms s
> be kept clean and orderly.

Summary of the Evidence

This citation was issued by MSHA inspector Ainge. The
ondition was hazardous because of the spillage of fine sand
ike material. This was evidenced by the amount of the spil
nd its angle of repose (Tr. 46, 85). The depth on one side
8 to 24 inches and the angle of repose was straight up. It
illed the walkway including a four-inch kick plate on the o
dge. There was a 30-foot drop to the ground. The railings
he walkway conformed to existing requirements. But if a ma
ripped and slid underneath the bottom midrail (21 to 24 inc
bove the walking level) he could slip to the ground resulti
possible fatality (Tr. 46, 47, 75, 76; Ex. P12).

The area was used several times a day to provide access

In the inspector's opinion on this slippery surface, it re than likely that an accident could occur (Tr. 49, 71-73, e potential for injury increases with any increased increme time (Tr. 72). Abatement was achieved by blocking off acc the area and by providing an alternative route (Tr. 49).

Mr. Mann indicated the spillage was not a hazard. Each e rock color is changed the area is cleaned (Tr. 237, 238). ere are guard rails around the tank and no one has been inj this condition (Tr. 238).

Evaluation of the Evidence

The factual setting establishes a violation of the gulation. I reject Mr. Mann's testimony that no hazard ex- ted. This was a passageway that was obviously not clean wi e meaning of the regulation. Mr. Mann does not deny the istence of the condition.

Citation 2246291 should be affirmed.

Civil Penalty

The mandate to assess civil penalties is contained in ction 110(i) now 30 U.S.C. 820(i) of the Act. It provides:

> (i) The Commission shall have authority to assess all ci penalties provided in this Act. In assessing civil mone penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of s penalty to the size of the business of the operator char whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity the violation, and the demonstrated good faith of the pe charged in attempting to achieve rapid compliance after notification of a violation.

Concerning prior history: the computer printout (Ex. P34 ows that respondent had no violations in the two year perio ding March 5, 1985. The printout shows two violations befo rch 6, 1983. But, as the respondent contends, these would pear to be the two citations vacated in Brubaker-Mann, Inc. SHRC 227 (1980). Accordingly, I conclude that the Secretar s failed to prove any adverse history on the part of respon

Briefs

The parties have filed excellent briefs [2]/ which most helpful in analyzing the record and defining the However, to the extent they are inconsistent with this they are rejected.

Conclusions of Law

Based on the entire record and the factual findin the narrative portion of this decision, the following of law are entered:

1. The Commission has jurisdiction to decide thi

2. Respondent did not violate 30 C.F.R. § 56.14-

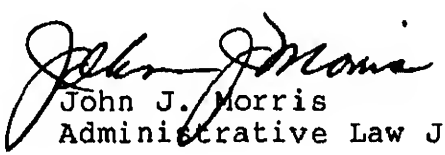
3. Respondent violated 30 C.F.R. § 56.20-3(a).

Based on the foregoing findings of fact and concl law I enter the following:

ORDER

1. Citation 2246288 and all penalties therefor a

2. Citation 2246291 is affirmed and a penalty of assessed.



John J. Morris
Administrative Law Judge

Distribution:

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SEP 30 1986

RETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
INE SAFETY AND HEALTH	:	
DMINISTRATION (MSHA),	:	Docket No. WEVA 85-201
Petitioner	:	A.C. No. 46-06104-03518
v.	:	
	:	Raven Dock
EN HOCKING COAL CORP.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

earances: Mary K. Spencer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Mr. William F. Zuspan, President, Raven Hocking Coal Corporation, Mason, West Virginia, for Respondent.

ore: Judge Melick

This case is before me upon a petition for assessment of il penalty under Section 105(d) of the Federal Mine Safety Health Act of 1977 (the Act). Petitioner has filed a ion to approve a settlement agreement and to dismiss the e. A reduction in penalty from $620 to $400 is proposed. ave considered the representations and documentation nitted in this case, and I conclude that the proffered tlement is appropriate under the criteria set forth in tion 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is NTED, and it is ORDERED that Respondent pay a penalty of 0 within 30 days of this order.

Gary Melick
Administrative Law Judge

tribution:

NSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-61-R
v.	:	Order No. 2711581; 10/23/8
CRETARY OF LABOR, INE SAFETY AND HEALTH DMINISTRATION (MSHA), Respondent	:	Blacksville No. 1 Mine
CRETARY OF LABOR, INE SAFETY AND HEALTH DMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 86-115 A.C. No. 46-01867-03669
v.	:	Blacksville No. 1 Mine
NSOLIDATION COAL COMPANY, Respondent	:	

DECISION

pearances: Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary); Michael R. Peelish, Esq., Pittsburgh, Pennsylvan for Consolidation Coal Co. (Consol).

fore: Judge Broderick

ATEMENT OF THE CASE

In the Contest proceeding, Consol challenges the propriet Order No. 2711581 issued on October 23, 1985 pursuant to ction 104(d)(2) of the Act. In the penalty proceeding, the cretary seeks a civil penalty for the violation charged in t ntested order. Pursuant to notice, the case was heard in rgantown, West Virginia on September 3, 1986. Federal Mine spector Joseph Baniak and miner Clarence Shaffer testified o half of the Secretary. Robert W. Gross, John Weber, Willis nsler and John Tharp, all supervisory Consol employees, stified on behalf of Consol. The parties waived their right le post hearing briefs, but each argued its position on the cord at the close of the hearing. I have considered the ent

owner and operator of an underground coal mine in Monongalia
ty, West Virginia, known as the Blacksville No. 1 Mine. The
produces coal which enters interstate commerce and its
ation affects interstate commerce.

2. Consol's annual production tonnage is approximately
00,000. The subject mine produces approximately 1,775,000
annually. Consol is a large operator.

3. Consol demonstrated good faith in abating the cited
ation after the order involved herein was issued.

4. The imposition of a civil penalty in this proceeding
not affect Consol's ability to continue in business.

5. The subject mine was assessed a total of 645 violations
he 24 months immediately preceding the issuance of the order
ved herein. Citations for absent fire sensors were issued
onsol on October 9, 1985 and October 17, 1985.

6. Order No. 2261971 was issued under section 104(d)(1) of
Act on March 6, 1984. There was no "clean inspection" of the
between March 6, 1984 and October 23, 1985, the date of the
contested herein.

7. On October 23, 1985 at 12:01 p.m., automatic fire
ors were absent on the 3-South Mother belt conveyor from the
piece extending approximately 700 feet outby. The belt
ices the P-1, P-2 and P-3 sections. It was operating at the

8. Inspector Baniak issued a § 104(d)(2) order because of
above described condition covering the entire 3-South Mother
conveyor.

9. At the time the order was issued, a crew was working
the area affected by the order. The air was ventilated to
return air course, but the ventilation was not completely
ctive, and up to 40% of the air was going to the working
ions.

10. When Inspector Baniak began his inspection of the
ect mine on October 3, 1985, he had a discussion with mine
gement concerning fire sensors because he heard from miners

respnsible for seeing that fire sensors were properly
When Baniak was told that the mine did not keep senso
warehouse, but recovered them from the long wall sect
criticized this practice. Management representatives
would order sensors.

12. Following the issuance of the citation for
sensors on October 9, 1985, Consol's safety superviso
the safety escort Willis Fansler to inspect all the m
for sensors. He checked all the belts on P-1, P-2, P
3-S Mother belt on October 14, 1985. All the fire se
in place.

13. The 3-S Mother belt was not advanced betwee
and October 23, 1985.

14. Consol's section foreman John Tharp perform
examinations of the 3-S Mother belt on October 21, 22
Tharp's examinations showed that fire sensors were pr
3-S belt on each of these days. He was aware of the
which had been issued for absent fire sensors on Octo
and 17, 1985.

DISCUSSION

The inspector concluded that fire sensors had ne
the 3-S Mother belt in the area cited. He based this
on the fact that there was no evidence of lubricant a
wire to which the sensors were to be attached, and no
that the wire had been pricked. Sensors have a thick
and are attached to the wire by a clasp which cuts in
I have carefully considered the Inspector's testimony
unable to disregard, and there is no reason to discre
positive testimony of Consol's witnesses that the sen
fact on the wire on the morning of October 23 and pri

REGULATION

30 C.F.R. § 75.1103-4(a) provides in part:

(a) Automatic fire sensor and warning device syst
shall provide identification of fire witnin each
flight (each belt unit operated by a belt drive)
(1) Where used, sensors resonding to temperatur

* * *

(3) When the distance from the tailpiece at loading points to the first outby sensor reaches 125 feet when point-type sensors are used, such sensors shall be installed and put in operation within 24 production shift hours after the distance of 125 feet is reached.
* * *

S

1. Whether the evidence establishes a violation of 30 C.F.R 1103-4(a)(1)?

2. If so, whether the violation was significant and antial?

3. If so, whether the violation resulted from Consol's rantable failure to comply with the standard?

USIONS OF LAW

1. Consol is subject to the provisions of the Mine Safety n the operation of the subject mine. I have jurisdiction the parties and subject matter of this proceeding.

2. The evidence shows a violation of 30 C.F.R. 1103-4(a)(1). I have found (finding of fact 7) that there no fire sensors on the 3-S Mother belt conveyor for a nce of 700 feet outby the tailpiece. This is a violation. eason for the absence of the sensors is not relevant to the whether a violation occurred.

3. The violation was of such nature as could significantly ubstantially contribute to the cause and effect of a mine y hazard.

Discussion

Fire sensors are designed to provide early warning of a fire ners on the working section. I have found (finding of 9) that a crew was working inby the area affected by the , and that some of the air from the belt was going to the

rking sections. In the event of a fire the miners on the
ction would not receive timely warning so that they could
the escapeway. Therefore I conclude that the violation
ntributed to "a measure of danger to safety" reasonably l
result in serious injury to miners. See Secretary v. Ma
al Company, 6 FMSHRC 1 (1984). I therefore conclude that
olation was serious.

4. The violation was not the result of Consol's
warantable failure to comply with the standard violated.

Discussion

The Commission apparently construes the term unwarrant
ilure to comply to refer to a violative condition which
sulted from indifference, willful intent, or a serious la
asonable care. United States Steel Corporation, 6 FMSHRC
984). This construction differs from that set out in Zie
al Co., 7 IBMA 280 (1977), and imposes a greater burden o
cretary than merely establishing the operator's negligenc
ew of my findings that Consol examined all belts for fire
nsors on October 14, 1985, and on the morning of October
85, and found them in place, I cannot conclude that the
olation resulted from Consol's indifference, willful inte
serious lack of reasonable care. There is no evidence of
use of the missing sensors at the time of the inspection.
nsol witnesses speculated that the condition resulted fro
ployee sabotage, but it did not present any evidence of s
botage. In view of the previous citations and the proble
nsol has had with keeping sensors on the belts, greater t
dinary vigilance was required to see that the sensors were
ace. I conclude that the violation resulted from ordinary
gligence.

5. Based on the criteria in section 110(i) of the Act,
findings and conclusions set out above, I conclude that a
propriate penalty for the violation is $750.

ORDER

Based on the above findings of fact and conclusions of
IS ORDERED:

1. The order contested in Docket No. WEVA 86-61-R
properly charged a violation of 30 C.F.R.

violation was not properly cited in a section 104(d)(2) withdrawal order, see Old Ben Coal Company, 1 FMSHRC 19 (1979); Itmann Coal Company v. Secretary, 2 FMSHRC 2193 (1980) (ALJ), since it was not a "similar violation" to charged in the prior § 104(d)(1) order. Therefore, the order is MODIFIED to a § 104(a) citation.

3. Respondent shall pay a civil penalty of $750 within days of the date of this decision for the violation described in conclusion of law No. 2.

James A. Broderick
James A. Broderick
Administrative Law Judge

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